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No. 08-____

IN THE

Supreme Court of the United States

DELMARVA POWER & LIGHT COMPANY and
ATLANTIC CITY ELECTRIC COMPANY,
Petitioners,

v.

UNITED STATES and
PSEG NUCLEAR, LLC and
PUBLIC SERVICE ELECTRIC AND GAS CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Despite collecting more than $20 billion from owners of nuclear power plants to construct a national repository for spent nuclear fuel (SNF), the Government failed to build the repository and defaulted on its obligation to remove SNF from the nuclear plants. This default required nuclear plants to set aside property for the indefinite storage of SNF, which resulted in a taking of private property. Nuclear plant owners who were required to divest their interests in nuclear plants and received distressed prices filed Fifth Amendment takings claims seeking just compensation equal to the diminished value of their interests. Under *United States v. Dow*, a Fifth Amendment claim may only be brought by the owner of the property at the time of the taking. Under the Claims Act, no unallowed claim against the Government may be voluntarily assigned. Here, the Government asserted that the sellers assigned their takings claims to the purchasers; conceded that the assignments were invalid; purported nonetheless to consent to the assignments; and then asserted that the claims were worthless in the hands of the purchasers who benefited from the diminished value. The judgment below validates the Government's consent.

The Question Presented is:

Whether the United States may consent to the assignment of an unallowed claim when the assignment is in contravention of *Dow* and concededly invalid under the Claims Act; and, if so, whether it may do so if the consent allows the United States to avoid paying just compensation for a taking of private property as required by the Fifth Amendment.

PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the Federal Circuit were: Delmarva Power & Light Company and Atlantic City Electric Company, the Plaintiffs-Appellants below; the United States, a Defendant-Appellee below; and PSEG Nuclear, LLC and Public Service Electric and Gas Co., also Defendants-Appellees below.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Delmarva Power & Light Company and Atlantic City Electric Company are each wholly owned subsidiaries of Conectiv, a Delaware company that is a wholly owned subsidiary of Pepco Holdings, Inc., which is a public utility holding company incorporated in Delaware.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Delmarva Power & Light Company (Delmarva) and Atlantic City Electric Company (ACE, and together with Delmarva, ACE/Delmarva) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit affirming the judgment of the United States Court of Federal Claims (COFC) granting summary judgment for the United States.

OPINIONS BELOW

The opinion of the Federal Circuit affirming the judgment of the COFC is reported at 542 F.3d 889

and is reprinted in the Appendix hereto at 1a-10a. The opinion of the COFC granting summary judgment to the United States is reported at 79 Fed. Cl. 205 and is reprinted at 11a-40a.

JURISDICTION

The Federal Circuit issued its judgment on September 18, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Federal Circuit had jurisdiction under 28 U.S.C. § 1295(a)(3). The COFC had jurisdiction under 28 U.S.C. § 1491.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The pertinent provisions of the Fifth Amendment to the United States Constitution, the Assignment of Claims Act, 31 U.S.C. § 3727 (formerly 31 U.S.C. § 203) (Claims Act), and the Assignment of Contracts Act, 41 U.S.C. § 15 (Contracts Act), are set out in the Appendix hereto at 41a-50a.

INTRODUCTION

This case presents this Court with the opportunity to answer a compelling Constitutional question: whether the United States may escape its Fifth Amendment obligation to pay just compensation for the taking of private property by engaging in litigation tactics that, as described by the lower court, "vitiate" a federal statute (36a), and produce a result in direct conflict with *United States v. Dow*, 357 U.S. 17 (1958). *Dow* holds that only the owner of property at the time of the taking, not a subsequent owner, is entitled to compensation, and reaffirms that takings claims may not be transferred in violation of the Claims Act. The Claims Act is designed to shield the Government from trafficking in claims against it by

voiding assignments of claims against the Government before those claims are allowed. Here, for the first time since the Claims Act was enacted in 1853, the Government has purported to "waive" the statute to effectuate the transfer of unliquidated takings claims from a seller to a buyer. Having engaged in conduct that diminished the value of a seller's property, the Government says to the seller: "Sorry, you assigned any takings claims you may have had to the buyer of your property. We've consented to that assignment and we owe you nothing." To the buyer, the Government says: "Sorry, the takings claims that were assigned to you are exactly offset by the reduced purchase price you paid for the devalued property. We owe you nothing."

The astonishing result is that, if the waiver device is condoned by this Court, the Government may extinguish a seller's takings claim without paying just compensation for the taking – to anyone – in direct violation of the Fifth Amendment. The immediate effect of the Federal Circuit's decision is to preclude ACE/Delmarva from pursuing on behalf of their electric customers takings claims against the Government, estimated to be valued at $80 to $100 million, for breach of its obligation to remove SNF from nuclear power plant sites. The decision will also have significantly broader impacts. For example, to ACE/Delmarva's knowledge, at least five other utilities – representing the interests of more than three million ratepayers – have sold interests in nuclear properties and have also brought takings claims against the Government.[1] In aggregate, those tak-

[1] Claimants before the COFC include: The Canal Electric Company, Case No. 04-0035C (interest of Canal in Seabrook plant sold to Florida Power & Light Company); Rochester Gas &

ings claims are likely to amount to hundreds of millions of dollars.

The decision below has broad applicability beyond the nuclear fuel cases: it gives the Government a new tool to brandish in any case involving the transfer of property impacted by a Government taking. That new weapon could be used at any time, for any reason, including the complete extinguishment of claims for just compensation. In the past, takings claims have arisen against the Government where, for example, Government action to control flooding, mining activities, dumping of spoil, wetlands degradation, or air quality impacts has reduced the value of private property. With the certain advent of new programs relating to climate change, such as the proposed designation of "corridors" or "reservation areas" for transmission lines, wind farms, geothermal drilling, and other Government purposes, such takings are destined to occur at an ever more rapid pace. Parties who transfer their property subsequent to a taking will find that the Government may, at will, escape liability for just compensation by simply alleging that the takings claim was transferred, consenting to the transfer, and then asserting an offset equal to the value of the claim. This Court should act to prevent that result, which flatly violates the Fifth Amendment to the Constitution, "vitiates" the Claims

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Electric Company, Case No. 04-0118C (interest of Rochester in Ginna plant sold to Constellation Energy, *see infra* p. 7 and note 3); Niagara Mohawk Power Corporation, Case No. 04-0125C (interests of Niagara Mohawk, Rochester, Central Hudson Gas and Electric Corporation and New York State Electric & Gas Corporation in first unit of Nine Mile Point plant sold to Constellation); and Niagara Mohawk Power Corporation, Case No. 04-0124C (interest of Niagara Mohawk in second unit of Nine Mile Point plant sold to Constellation).

Act, and is in direct contravention of controlling Supreme Court precedent.

STATEMENT OF THE CASE

This case involves takings claims arising as a result of the Department of Energy (DOE)'s failure to remove and dispose of SNF accumulating at nuclear power plants, and the Government's subsequent attempt to avoid its Fifth Amendment obligation to pay just compensation for the takings.

DOE's Breach of Its Obligation to Remove SNF

In 1982, Congress enacted the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. §§ 10101-10270, which required the Government "to provide for the permanent disposal of [SNF] . . . in order to protect the public health and safety." 42 U.S.C. § 10131(a)(4). It also required that DOE begin removal of SNF from nuclear power plant sites for storage in a national repository "beginning not later than January 31, 1998." 42 U.S.C. § 10222(a)(5)(B). Each nuclear power plant owner was required to pay significant fees for this service, on average in excess of $100 million per plant.

Despite collecting more than $20 billion in fees, DOE failed to begin removing SNF from nuclear plant sites or to construct a national repository for SNF. As a result, nuclear plants were forced, at considerable cost, to continue storing existing SNF and to set aside property and facilities for indefinite accumulation and storage of additional SNF. This dedication of property to store SNF rendered that property useless for any other purpose, which ACE/Delmarva assert is a taking of private property for Government use that requires just compensation.

Many nuclear plant owners filed claims in the COFC for damages against the Government for its failure to honor its statutory obligation to remove SNF, and in 2000, the Federal Circuit held that the Government is liable for its failure to begin removing SNF by January 31, 1998. *Me. Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1343 (Fed. Cir. 2000). The more than 60 cases now pending before the COFC generally are limited to determining the nature and extent of the damages caused by DOE's failure to perform its obligations.

ACE/Delmarva's Diminished Value Claim

ACE/Delmarva are former owners of interests in three nuclear power plants – the Peach Bottom, Hope Creek, and Salem nuclear stations (the Nuclear Stations). On September 27, 1999, to comply with state and federal regulatory policies, ACE/Delmarva sold their interests in the Nuclear Stations to PSEG Power LLC, parent of PSEG Nuclear, LLC (PSEG), and PECO Energy Company (PECO). Because the value of the Nuclear Stations had been dramatically reduced by DOE's continuing failure to remove SNF, with no end in sight, the prices paid by the purchasers reflected a significantly reduced value for the property and facilities themselves, and were based primarily on the value of live (unspent) nuclear fuel, spare parts, and equipment.

The agreements governing the sales included language to the effect that ACE/Delmarva's claims against the Government were being assigned to PSEG and PECO. In 2001, PSEG sued DOE for contractual breach of its obligation to dispose of the Nu-

clear Stations' SNF, a case which is currently pending in the COFC.[2]

In September 2003, ACE/Delmarva informed PSEG that they intended to file takings claims against the United States to recover the diminished value of the Nuclear Stations at the time of sale. ACE/Delmarva noted that, despite the broad contract assignment language, such takings claims belong uniquely to ACE/Delmarva as the property owners at the time of the takings and, in any event, the Claims Act would bar their assignment. ACE/Delmarva filed their complaints on January 13, 2004. In September 2004, the Government argued in another SNF case (*Rochester Gas & Elec. Corp. v. United States*, No. 04-0118C (Fed. Cl. filed Jan. 29, 2004)) that assignments of claims against the Government were invalid under the Contracts and Claims Acts.[3] Nonetheless, at a hearing in June 2005, when the COFC asked the Government to take a position regarding the validity of the assignments at issue here, the Government refused to do so.

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[2] *PSEG Nuclear LLC and Public Service Electric and Gas Co. v. United States*, COFC Case No. 01-0551C. PECO later merged into Exelon Generation Company, which also sued DOE. *Exelon Generation Co. v. United States*, COFC Case No. 04-0102C. That lawsuit was settled in August 2004, and a stipulation of dismissal was entered on August 9, 2004.

[3] The COFC held in that case that the NWPA is a statutory override of the Contracts and Claims Acts that permits the assignment of *contract* claims against the Government, but not *takings* claims. *Rochester Gas & Elec. Corp. v. United States*, 65 Fed. Cl. 431, 441 & n.11 (2005) (citing *Dow*). *See infra* p. 11.

The Government's Purported Waiver of the Claims Act

More than two years later, during an August 2007 hearing, the COFC demanded that the Government take a position on the assignment of ACE/Delmarva's claims. (22a.) For the first time in any SNF case – seven years after the alleged assignment, and four years into the litigation of ACE/Delmarva's claims – the Government filed a "Notice Regarding the Assignment of Plaintiffs' Claims" purporting to accept the assignment of ACE/Delmarva's takings claims to PSEG and PECO. (51a-54a.) The Government's acceptance, however, was accompanied by the assertion that the claims would have no value in PSEG's hands because any claims brought by PSEG "would be offset by the benefits that PSEG Nuclear obtained through [its] price reduction" (53a).[4]

The Federal Circuit's Decision Permitting the Claims Act Waiver

The COFC issued its decision on November 13, 2007, finding that the purported assignment violated the Claims Act, but that the Government's "express acceptance of the assignments serves to vitiate the provisions" of the statute. (36a.) Based on its conclusion that the Government may waive the Claims Act, and relegating *Dow* to a footnote (35a n.8), the COFC granted the Government's motion for summary judgment. ACE/Delmarva appealed to the Federal Circuit, which affirmed the COFC. The Federal Cir-

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[4] It also stated that the Government had accepted the purported assignment of ACE/Delmarva's takings claims to PECO's parent, Exelon, thus "extinguishing those claims." (53a.) Exelon has no interest in this litigation as a result of its 2004 settlement with the Government. *See supra* note 2.

cuit acknowledged that the assignment of the takings claims violated the Claims Act on its face. (6a.) However, based on its analysis of cases decided under another statute, the Contracts Act, and without relying on a single Claims Act case, it found that the Government was entitled to waive the Claims Act. (6a-9a.) It ignored *Dow* completely. It also ignored the practical effect of its decision, which is to extinguish ACE/Delmarva's claims for just compensation under the Fifth Amendment.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to reverse the Federal Circuit judgment, which conflicts with the clear language of both the Fifth Amendment and the Claims Act, this Court's holding in *Dow*, and its other well-established Claims Act precedent. The Federal Circuit decision raises an important issue of Constitutional and federal law: whether courts may rewrite the Claims Act to give the United States the power to avoid its Fifth Amendment obligation to pay just compensation for a taking of private property by waiving the ban on assignment of unallowed claims established in the Claims Act. Unless this Court acts to overturn the decision below, the Federal Circuit will have swept away more than a century of Claims Act precedent.

I. This Court Should Grant Certiorari To Reaffirm *Dow*

The Federal Circuit has created an "escape hatch" through which the Government can circumvent *Dow* and avoid paying just compensation for taking private property. The decision permits the transfer of a takings claim from the property owner who suffered the taking to a subsequent purchaser of the property,

who benefitted from the taking by paying a substantially lower price and who therefore has no basis for claiming just compensation. The result – extinguishing the original owner's claim by transferring it to a party that cannot pursue it – is not only nonsensical, it is contrary to the Fifth Amendment command "nor shall private property be taken for public use without just compensation" (41a).

This result also directly conflicts with this Court's decision in *United States v. Dow*, 357 U.S. 17 (1958), which held just compensation is due to the original property owner. *Id.* at 20-21. In *Dow*, the Government had exercised its power of eminent domain to acquire an easement for a pipeline. The primary issue was whether the compensation claim vested in the owners at the time the United States took possession of the easement in 1943, or whether it vested in a later owner who acquired the land before the Government filed a declaration of taking in 1946. *Id.* at 18-19. This Court held that the attempt to convey the claim to the subsequent owner was ineffective because the "Claims Act prohibits the voluntary assignment of a compensation claim against the Government for the taking of property."[5] The *Dow* Court emphasized that "'[since] compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment.'"[6]

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[5] *Id.* at 20 (citing *United States v. Shannon*, 342 U.S. 288 (1952)); *see Shannon*, 342 U.S. at 291-93 (deed assigning any claim for damages to the property caused by United States soldiers "falls clearly within the ban" of the Claims Act).

[6] *Dow*, 357 U.S. at 20-21 (alteration in original) (quoting *Danforth v. United States*, 308 U.S. 271, 284 (1939)).

The Federal Circuit ignored *Dow*, and the COFC relegated it to a footnote (35a n.8),[7] even though ACE/Delmarva had held up *Dow* as controlling. Both courts missed the point, grasped by Federal Claims Court Judge Lettow in *Rochester Gas*, that under *Dow*, the Claims Act "bars the assignment of a takings claim against the United States" because "[f]or a party to allege that its property right has been taken, it must have owned the property at the time that the alleged taking occurred." *Rochester Gas & Elec. Corp. v. United States*, 65 Fed. Cl. 431, 441 (2005).

PSEG did not own ACE/Delmarva's interests in the Nuclear Stations at the time of the Government's takings; ACE/Delmarva did. Under *Dow*, ACE/Delmarva's takings claims may not be assigned to PSEG. Nor may they be assigned and then extinguished because, "in the event of a taking, the compensation remedy is required by the Constitution." *First English Evangelical Lutheran Church v. County of Los Angeles, Cal.*, 482 U.S. 304, 316 (1987).[8]

This Court should grant certiorari because the Federal Circuit simply cannot ignore *Dow*, nor can its decision stand under the Fifth Amendment.

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[7] Judge Miller dismissed *Dow*'s holding as "primarily establishing when a taking occurs" (35a n.8), ignoring this Court's finding that the transfer of the claim was a voluntary assignment within the Claims Act's prohibition and that the Court "would not be justified in relaxing the rigor of the Act," *Dow*, 357 U.S. at 20.

[8] It is well established that "an attempted assignment of a claim against the United States does not forfeit the claim. It leaves the claim where it was before the purported assignment." *Colonial Navigation Co. v. United States*, 181 F. Supp. 237, 240 (Ct. Cl. 1960). As to the assigned claim, the assignor "is the party in interest, and the only party whose rights the Government is obliged to regard." *Id.*

II. This Court Should Grant Certiorari Because The Federal Circuit's Creation Of A Waiver Right Conflicts With The Plain Language Of The Claims Act And This Court's Claims Act Precedent

The Claims Act states plainly that "[a]n assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." 31 U.S.C. § 3727(b) (42a). The decision below – holding that the "'Government's recognition and acceptance of such an assignment makes it a valid assignment'" (9a) – ignores the plain language of the statute and reads a waiver mechanism into the Claims Act, giving the Government unprecedented power to validate otherwise invalid assignments.

That is the very power this Court long ago concluded the Government does not have. In *McKnight v. United States*, 98 U.S. 179 (1878), the Court acknowledged that the Government's payment of part of a claim to an assignee *after allowance* was valid, but made it plain that the Government could not waive the Claims Act to permit assignment of the unascertained portion of the claim:

> An agreement to that effect, express or implied, looking to the future, would have been without validity. There could have been no consideration for it, and *no one had authority to make it*.

Id. at 186 (emphasis supplied). In short, under *McKnight*, the Government is without the waiver authority that the Federal Circuit wrongly concluded it has.[9]

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[9] Even if authorized, any waiver would not relieve the Government of its liability for the takings claim. *See First Eng-*

The effect of a waiver – allowing an assignee to bring a claim – is also contrary to the holdings of this Court under the Claims Act. In *United States v. Gillis*, 95 U.S. 407 (1877), this Court observed that because claims against the Government are not generally assignable at common law, there must be statutory authority for an assignment that would give the assignee the right to bring an action in his own name. *Id.* at 412-13. This Court recognized that Congress had not given "negotiability to claims against the government," and had instead enacted the Claims Act that "strikes down and denies any effect" to such assignments. *Id.* at 413-14. It concluded that "claims against the United States cannot be assigned so as to enable the assignee to bring suit in his own name in the Court of Claims." *Id.* at 417. Yet this is precisely what the Federal Circuit decision would enable PSEG to do. Moreover, the Federal Circuit decision is not saved by the practical fact that PSEG cannot recover on the claim, due to the Government's clever assertion that PSEG's claim is offset because it was the beneficiary of the diminished value (a fact the Federal Circuit never even mentioned).[10]

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lish, 482 U.S. at 321 ("[W]here the government's activities have already worked a taking of all use of property, *no subsequent action by the government* can relieve it of the duty to provide compensation for the period during which the taking was effective." (emphasis supplied)).

[10] The decision is also contrary to *Spofford v. Kirk*, 97 U.S. 484 (1878), because, while the Claims Act "incapacitates every claimant upon the government from creating an interest in the claim in any other than himself," *id.* at 488-89, the Federal Circuit gives PSEG an interest in ACE/Delmarva's takings claims. Likewise, it is contrary to *Nutt v. Knut*, 200 U.S. 12 (1906), because it allows a party that "was a stranger to the original

This Court's Claims Act holdings are still good law, and not, as the court below suggested (9a), "older Supreme Court cases" that may be swept aside. Focusing on the fact that the original Claims Act stated that all purported assignments "shall be absolutely null and void" (44a), while the present-day Claims Act (42a) does not contain that phrase (9a), the Federal Circuit completely ignored the legislative history of § 3727, which was one of many laws revised in 1982 "without substantive change" as part of a comprehensive codification of Title 31.[11] That history specifically disavows any intent to "impair the precedent value of earlier judicial decisions,"[12] such as *McKnight*, *Gillis*, *Spofford*, *Nutt*, and *Downie*.

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transaction to come between the claimant and the Government, prior to the allowance of a claim." *Id.* at 20. Finally, the decision is contrary to *National Bank of Commerce v. Downie*, 218 U.S. 345 (1910), because the ACE/Delmarva cases, like those in *Downie*, "are clean-cut cases of a voluntary transfer of claims against the United States, before their allowance, in direct opposition to the statute." *Id.* at 356.

[11] In the 1982 codification, the Claims Act was slightly rephrased and relocated from 31 U.S.C. § 203 (44a-47a) to 31 U.S.C. § 3727 (42a-44a). The language in § 203 at the time of the 1982 codification was similar to the original Claims Act language from the Act of February 26, 1853, 10 Stat. 170.

[12] *See* An Act to revise, codify, and enact without substantive change certain general and permanent laws, related to money and finance as title 31, United States Code "Money and Finance," Pub. L. No. 97-258, 96 Stat. 877, 877, 976-77. The House Report explains: "[T]his bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions . . . . This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification law, however, the courts uphold the contrary presumption: the law

The critical fact is that, under both the original and the present-day Claims Acts, a voluntary assignment of a claim before its allowance is not valid.[13] The Federal Circuit recognized as much:

> On its face, this [Claims Act] language covers the assignments of the takings claims. The claims had not been allowed (indeed, the government contested them), their amount was undecided, and no warrant for their payment had been issued.

(6a.) The court then declared that "[t]he only basis upon which the assignments could be validated under the Act is if the government validly waived the application of the Act." (6a.)

Ignoring *McKnight* and without relying on a single Claims Act case (much less any case holding that the Government may waive the Claims Act), the Federal Circuit looked to decisions of its predecessor court under the Contracts Act that hold that the Government may recognize the assignment of a *con-*

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is intended to remain substantively unchanged." H.R. Rep. No. 97-651, at 3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1897.

[13] Assignments may be valid after a claim has been allowed. *See* discussion of *McKnight*, *supra* p. 12; *see also Freedman's Sav. & Trust Co. v. Shepherd*, 127 U.S. 494, 505-06 (1888). Also, this Court has carved out an exception for assignments that occur "by operation of law" or under circumstances that are closely analogous. *See, e.g.*, *Erwin v. United States*, 97 U.S. 392, 397 (1878); *Goodman v. Niblack*, 102 U.S. 556, 560-61 (1881). The alleged assignments from ACE/Delmarva to PSEG could not be characterized as anything other than voluntary transfers outside these exceptions to the Claims Act.

tract.[14] On the ground that both statutes are for the protection of the Government and embody similar principles (8a),[15] the court concluded that there is "no valid reason why the government should not also be able to waive the [Claims] Act's prohibition in section 3727(a) against the assignment of claims." (8a.) In that one fell swoop, the court below gave to individual Government employees the ability to override a federal statute that Congress intended to be absolute, and to effectuate the transfer of an unliquidated claim, which this Court has repeatedly said is forbidden. The grossly simplistic reasoning employed by the Federal Circuit in support of this result ignores not only this Court's cases, but also critical differences between the Claims Act and the Contracts Act, as well as critical differences between the nature of a claim against, and a contract with, the Government.[16]

The language of the Claims Act is absolute regarding what is a valid assignment. The Contracts Act is different because it addresses the validity, not of the assignment itself, but rather of the assigned contract:

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[14] The court below cited *Tuftco Corp. v. United States*, 614 F.2d 740 (Ct. Cl. 1980), and *Maffia v. United States*, 163 F. Supp. 859 (Ct. Cl. 1958). (6a-8a.)

[15] As the court below noted, the two separate statutory provisions constituting the Claims Act and the Contracts Act are commonly called the Anti-Assignment Act. (5a.) For this reason, courts on occasion lump the two together or confuse their distinct provisions.

[16] A contract *with* the Government, which reflects a mutual agreement, is not analogous to a claim *against* the Government, which often, especially in the context of a taking, evidences the absence of agreement. A contract "belongs" to both parties; a claim "belongs" to the party bringing it. A contracting party has an obligation to perform; a claimant has none.

> No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

41 U.S.C. § 15(a) (47a). Under the Contracts Act, the assignment of a contract may be valid, but the assigned contract may be annulled[17] so that the Government is not obliged to deal with a party other than the one with whom it chose to contract.[18] Because there is no reason that the Government may not subsequently choose to contract with a third party, such as the assignee, the Government may waive the annulling effect of the Contracts Act on the assigned contract.[19]

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[17] This contrasts sharply with the Claims Act, which invalidates the assignment, but not the claim. *See supra* note 8.

[18] *See Hobbs v. McLean*, 117 U.S. 567, 576 (1886) (The Claims Act and the Contracts Act "were passed in order that the government might not be harassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and a settlement made."); *see also Francis ex rel. Myrick v. United States (Francis's Case)*, 11 Ct. Cl. 638, 640 (1875) ("The obvious reason for this enactment was to secure to the United States the personal attention and services of the contractor . . . .").

[19] This conclusion is reinforced by the Contracts Act provisions that (i) "cause the annulment of the contract . . . so far as the United States is concerned" and (ii) "reserve[ ] to the United States" "rights of action . . . for any breach of such contract." (47a.) These provisions, which suggest Government discretion, do not appear in the Claims Act.

The practical reasons for treating contracts under the Contracts Act differently from claims under the Claims Act were recognized early on. United States Attorney General Devens opined in 1877, and again in 1879, that the Government may, but is not compelled to, annul an assigned contract, observing that otherwise any party to a contract with the Government could walk away from it simply by assigning it. 15 Op. Att'y Gen. 235 (1877); 16 Op. Att'y Gen. 277 (1879). With respect to the Claims Act, Attorney General Devens opined that a power of attorney "had at no time a legal existence, so far as it affected the claim of the contractor" against the Government. 16 Op. Att'y Gen. 261, 262-63 (1879). Indeed, the contractor's claim was the "only one to be recognized by the United States." *Id.* at 263.

In light of the different characteristics of a claim and a contract, and the differing approaches of the Claims Act and the Contracts Act, it is not surprising, as the court below observed, that "none of [the Supreme Court] cases involved any question of, or decided whether the government could recognize as valid, an assignment of claims that otherwise would violate the statute." (9a.) First, the question was addressed and settled by the Attorney General roughly contemporaneously with the enactment of the Claims and Contracts Acts. Second, it would be nonsensical to apply the concept of Government recognition or consent to an assignment that, under the Claims Act and this Court's Claims Act decisions, is flatly invalid or null and void. Third, the Government has always utilized the Claims Act as a shield, to guard against an obligation to pay any party other than the original claimant. It has never to our knowledge used the statute as a sword to divest a claimant of its claim and to escape liability altogether.

This Court should close the "escape hatch" created by the Federal Circuit decision and affirm that the Claims Act may not be waived as to unallowed claims, and certainly not for the purpose of extinguishing takings claims. If it does not, the Government could wield this extraordinary power to deny just compensation whenever an owner whose property is taken transfers ownership of that property prior to litigating its takings claim. And that will not be infrequent, as neither takings claims nor property transfers are infrequent.[20] Takings claims will continue to arise in the contexts of flood controls, mining activities, dumping of spoil, and anti-degradation measures for wetlands, and more will be filed when "corridors" or "reservation areas" for transmission lines, wind farms, and geothermal drilling are designated. And, as an immediate matter, there are pending takings claims, like those in this case, for the Government's failure to remove SNF, that are worth hundreds of millions of dollars. Permitting the Government to waive the Claims Act transforms it from a statute designed to protect the Government from trafficking in claims against it by determining *which property owner* may bring a claim, to a statute empowering it to prevent *any property owner* from receiving just compensation for a taking –

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[20] Courts are frequently called upon to address the interplay of takings claims and property transfers. *See, e.g., Bailey v. United States*, 78 Fed. Cl. 239, 274-75 (2007) (original property owner has takings claims for denial of a permit for an access road due to wetlands protection); *Martin v. United States*, 30 Fed. Cl. 542, 551-52 (original property owner has takings claim for Federal easement for spoil disposal that restricted development of a marina on private property), *aff'd*, 41 F.3d 1519 (Fed. Cir. 1994).

a result that "vitiates" not only the Claims Act, but also the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Docket No. 2008-5010

DELMARVA POWER & LIGHT COMPANY
and ATLANTIC CITY ELECTRIC COMPANY,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee,

and

PSEG NUCLEAR, LLC and
PUBLIC SERVICE ELECTRIC and GAS CO.,
Defendant-Appellees.

Appeal from the United States Court of Federal Claims in Cases No. 04-0034C and 04-0036C, Judge Christine O.C. Miller

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DECIDED: September 18, 2008

Before: LINN, FRIEDMAN, and PROST, *Circuit Judges.*

FRIEDMAN, *Circuit Judge.*

The question in this appeal, which this court has not previously decided, is whether the United States may, in a particular case, waive the prohibition in the

Anti-Assignment Act, 31 U.S.C. § 3727 (2000), against the assignment of claims against the United States and thereby validate an assignment that that Act otherwise would prohibit. The Court of Federal Claims upheld the government's authority to do so, and we *affirm*.

I

A. This case arises out of the federal government's program, thus far unsuccessful, to remove and dispose of spent nuclear waste resulting from the operation of this country's nuclear electric generating facilities. The program is described in *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1337-39 (Fed. Cir. 2000). In brief, in 1983 the Department of Energy, pursuant to a statutory directive, entered into standard contracts with the country's nuclear electric generating companies, under which (1) the government agreed to begin accepting and disposing of spent nuclear waste by January 1, 1998 and (2) the utilities agreed to pay the government substantial amounts for its service, including both a one-time fee based on past nuclear generation of electricity and on-going fees.

The government was unable to inaugurate its waste disposal program and the utilities filed suits challenging that default. In *Maine Yankee*, this court held that the government had breached the standard contract by failure to commence the waste disposal program by the specified date and that the utilities could maintain breach-of-contract damage suits against the government for that default.

B. The appellees PSEG Nuclear and Public Service Electric and Gas Co. (collectively "PSEG") own and operate nuclear facilities. The appellants

Delmarva Power & Light Co. ("Delmarva") and Atlantic City Electric Co. ("Atlantic City") (collectively "the Assignors") are electric utilities that owned minority undivided interests in those nuclear plants. In September 1999, the Assignors by written contracts (the "Transfer Agreements") agreed to transfer to PSEG, in return for approximately $30 million, their interests in those nuclear plants. In the Transfer Agreements the Assignors also transferred to PSEG "[a]ll claims of Seller relating to or pertaining to the Department of Energy's defaults . . . including all claims for failure by the Department of Energy to take Spent Nuclear Fuel . . . ."

In January 2004, Delmarva and Atlantic City each filed a complaint in the Court of Federal Claims seeking damages from the United States for the Department of Energy's breach of its contracts to begin removal of the waste from PSEG's nuclear plants in which each had a minority interest. Although the original complaints alleged various theories of liability, in this appeal they rely only on their claim that the government's breach of contract constituted a taking of their former property interests in the nuclear plants, for which they are entitled to just compensation. The takings theory is that the government's breach of the removal contracts diminished the value of the nuclear plants, and as a result, they received less on the sale of their interest in those plants. The two cases have been consolidated.

When PSEG became aware of the claims the Assignors had asserted in this lawsuit, it invoked the arbitration clause of the Transfer Agreements to argue that the claims the Assignors had assigned in the Transfer Agreements included the taking claims. In proceedings to which the government was not a

party, the arbitrators sustained PSEG's contention. The Assignors challenged the arbitration decision in a New Jersey state court, which upheld the award.

The Assignors moved the Court of Federal Claims to vacate the arbitration award. The court then stated that the government should indicate whether it waived its rights under the Assignment-of-Claims Act. In response, the government filed a document which included the following statement:

> [T]he Government is exercising its sole discretion to accept the assignments of those claims that the plaintiffs purported to make to PSEG Nuclear, to the extent that we have been made aware of those claims through the plaintiffs' complaint in this action and through the assignment provisions in the purchase and sale agreements that have been included in the appendices to some of the briefing in this case.

The Court of Federal Claims granted summary judgment for the government and dismissed the case. The court held that the government properly waived its right, under the Assignment of Claims Act, to invalidate the assignments; that the assignments included the takings claims; and that having assigned those claims to PSEG, the Assignors had no basis for asserting those claims in this case.

II

A. The language of the assignment clause of the Transfer Agreements on its face covers the takings claims, and the Assignors apparently do not contend otherwise. The Transfer Agreements included among the "Purchased Assets":

> All claims of Seller relating to or pertaining to the Department of Energy's defaults under the

> Department of Energy Standard Contract (including all claims for failure by the Department of Energy to take Spent Nuclear Fuel) accrued prior to, on or after the Closing Date, whether relating to periods prior to, on or after the Closing Date, and all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets, other than the claims described in Section 2.2(1) . . . .

This provision was followed by 13 separate "Excluded Assets" that were "hereby specifically excluded from the definition of Purchased Assets."

The takings claims were "claims . . . relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract" and "claims for failure by the Department of Energy to take Spent Nuclear Fuel." None of the exceptions in the "Excluded Assets" covered the takings claims. Since the assigned claims include the takings claims, the remaining issue is whether the Anti-Assignment Act barred those assignments, as the Assignors contend. In deciding that issue, we assume *arguendo*, but do not decide, (1) that parties other than the United States may challenge under the Anti-Assignment Act an assignment of claims against the government and (2) that the Assignors are not estopped from challenging their voluntary assignment of such claims.

B. As this court has noted, "[w]hat is commonly called the Anti-Assignment Act consists of two statutory provisions." *Fireman's Fund Ins. Co. v. England*, 313 F.3d 1344, 1349 (Fed. Cir. 2002). Under 41 U.S.C. § 15(a), which is not directly at issue in this case, "[n]o contract . . . or any interest therein, shall

be transferred by the party to whom such contract . . . is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned." This prohibition is inapplicable when the monies due from the United States are assigned to a "financing institution." The other provision, here at issue, 31 U.S.C. § 3727(a)(1), (b), provides that an

> assignment of any part of a claim against the United States Government or of an interest in the claim . . . may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued.

This provision contains a similar exception for assignment to a "financing institution" of money due under a contract. 31 U.S.C. § 3727(c).

"These two provisions together broadly prohibit . . . transfers of contracts involving the United States or interests therein, and assignment of claims against the United States." *Fireman's Fund*, 313 F.3d at 1349.

On its face, this language covers the assignments of the takings claims. The claims had not been allowed (indeed, the government contested them), their amount was undecided, and no warrant for their payment had been issued. The assignee of the claims was not a "financing institution," but a power company. The only basis upon which the assignments could be validated under the Act is if the government validly waived the application of the Act.

C. In *Tuftco Corp. v. United States*, 614 F.2d 740 (Ct. Cl. 1980), our predecessor court, the Court of Claims, whose decisions are binding precedent here,

South Corp. v. United States 690 F.2d 1368, 1370 (Fed. Cir. 1982), held that the government validly waived the prohibitions against the assignment of government contracts in 41 U.S.C. § 15, *Tuftco*, 614 F.2d at 744. Although the case involved quite different facts, its analysis and reasoning are instructive and helpful in deciding the present case.

In *Tuftco*, parties to two government contracts to sell goods to the government assigned the contracts to Tuftco and its affiliate to perform them. Prior to the assignments, the original contractors informed the contracting officer about the proposed action, and the latter agreed to and recognized the assignments. The assignee performed the contracts. The government, however, paid a portion of the contract price to the original contractor rather than to the assignee. When the assignee sued the government for the amount it had not been paid, the government contended that the Anti-Assignment Act barred the suit.

The Court of Claims rejected the contention. It explained:

> [T]he contracting officer was fully aware of the assignments, recognized them, and communicated such recognition to plaintiff. In this case the action of defendant constituted a waiver of the Act's provisions, including the notice provision applicable to banks and financial institutions. Having chosen to recognize the assignments, defendant was bound to act in accordance with their terms.

Tuftco, 614 F.2d at 743-44.

The court noted "the long-recognized principle that 'Despite the bar of the Anti-Assignment statute (41 U.S.C. § 15), the Government, if it chooses to do

so, may recognize an assignment.'" *Id.* at 745 (citations omitted); *see Maffia v. United States*, 163 F. Supp. 859, 862 (Ct. Cl. 1958) ("Despite the bar of the [Assignment of Claims Act], the Government, if it chooses to do so, may recognize an assignment.").

The primary dispute in *Tuftco* was not whether "the Government may recognize an assignment"—the parties had "agreed" it may do so—but over "what actions by the Government will constitute recognition." *Id.* The Court of Claims held that "the Government was aware of, assented to, and recognized the assignments." *Id.* In the present case there is no question that if the government may recognize an otherwise invalid assignment of claims against it, the government's written "accept[ance]" of the claims filed in the Court of Federal Claims was a "recognition" of them.

We see no valid reason why the government should not also be able to waive the Anti-Assignment Act's prohibition in section 3727(a) against the assignment of claims. Both provisions of that statute "are for the protection of the Government." *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 371 (1949) (quoting *Martin v. Nat'l Sur. Co.*, 300 U.S. 588, 594 (1937)). Although the two provisions deal with different aspects of relationships and dealings with the government, they serve the common goal of protecting the government from similar problems that may arise from those relationships. "In general terms, however, the concerns of the two statutes and the legal concepts involved in their applicability are the same." *Tuftco*, 614 F.2d at 744, n. 4. As the Court of Federal Claims here stated, the two statutes "embody similar principles."

If, as in this case, the government concludes that it is appropriate and in its best interest to accept the assignment, it may do so. As the Court of Federal Claims here properly concluded, the "Government's recognition and acceptance of such an assignment makes it a valid assignment."

The Assignors rely upon older Supreme Court cases that describe assignments within the scope of the Anti-Assignment Act as "null and void" unless they complied with all of the statutory requirements, e.g., *National Bank of Commerce v. Downie*, 218 U.S. 345 (1910); *Nutt v. Knut*, 200 U.S. 13 (1906); and *McKnight v. United States*, 98 U.S. 179 (1878). At that time, however, the statute itself stated that such assignments were "null and void." The present statute does not so provide; instead, it merely specifies the conditions under which an assignment of a claim against the United States "may be made" and that "[a]n assignment under this subsection is valid for any purpose." Even more significantly, none of those cases involved any question of, or decided whether the government could recognize as valid, an assignment of claims that otherwise would violate the statute.

The Assignors also contend that the government should be judicially estopped here from arguing that the Anti-Assignment Act does not preclude the assignment because in *Rochester Gas & Electric Co. v. U.S.*, 65 Fed. Cl. 431 (2005), a parallel case, it argued that a similar claim assignment was invalid under that Act. In *Rochester Gas*, however (unlike the present case), the government had not waived the application of the Anti-Assignment Act to the particular claim assignment at issue. In the present case, as we have indicated, except for the waiver, the

assignment of the takings claims would violate the Anti-Assignment Act.

CONCLUSION

The judgment of the Court of Federal Claims granting summary judgment for the United States is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

Dockets Nos. 04-34C & -36C

DELMARVA POWER & LIGHT CO.,
and ATLANTIC CITY ELECTRIC CO.,
Plaintiffs,

v.

UNITED STATES,
Defendant,

and

PSEG NUCLEAR, LLC, and
PUBLIC SERVICE ELECTRIC AND GAS CO.,
Limited purpose Intervenor-Defendants

FILED: November 13, 2007

MEMORANDUM OPINION AND ORDER

MILLER, Judge.

This matter is one of many that are pending in, and that have been before, the United States Court of Federal Claims involving contracts between the Department of Energy ("DOE") and commercial operators of nuclear power plants concerning the disposal of spent nuclear fuel ("SNF"). Both Delmarva Power & Light Co. ("Delmarva") and Atlantic City Electric Co. ("ACE") (collectively "plaintiffs") were owners, until September 27, 1999, of minority

interests in two commercially operated nuclear power plants: the Salem Nuclear Generation Station Units 1 and 2 ("Salem") and the Peach Bottom Atomic Power Station Units 2 and 3 ("Peach Bottom"). ACE was also an owner of a minority interest in a third nuclear plant, the Hope Creek Nuclear Generating Station ("Hope Creek"). In the instant action, plaintiffs assert three causes of action. First, plaintiffs allege that DOE has committed a partial breach of its contractual obligation to receive SNF. Secondly, plaintiffs allege that DOE breached the implied covenant of good faith and fair dealing by failing to accept SNF. Finally, plaintiffs allege that DOE's failure to meet its obligations under both the Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101-10270 (2000) (the "NWPA"), and its contracts with plaintiffs forced plaintiffs to store SNF on their property, consequently reducing the value of their property and causing substantial economic harm that constituted a Fifth Amendment taking of property for which plaintiffs have received no just compensation.

Pending before the court are two separate motions. The first motion is plaintiffs' Motion To Vacate Arbitration Ruling filed July 2, 2007. PSEG Nuclear LLC and Public Service Electric and Gas Co. (collectively "PSEG") intervene as defendants in this case for the limited purpose of opposing this motion. The second motion is defendant's renewal of its motion to dismiss, originally filed May 12, 2004, or, in the alternative, its motion for summary judgment, originally filed April 28, 2005. These motions were renewed on September 12, 2007, upon inquiry by the court in its August 30, 2007 order requesting supplemental briefing concerning the Government's acceptance of plaintiffs' assignment of claims to the subsequent purchaser PSEG, which has intervened in these pro-

ceedings for the limited purpose of arguing its position on the issues addressed herein. Defendant's renewed motion for dismissal or, in the alternative, for summary judgment, addresses plaintiffs' amended complaints in both cases.

BACKGROUND[1]

Plaintiffs filed separate complaints on January 13, 2004, seeking relief solely on a takings theory. *Atl. City Elec. Co. v. United States*, No. 04-36C (Fed. Cl. filed Jan. 13, 2004); *Delmarva Power & Light Co. v. United States*, No. 04-34C (Fed. Cl. filed Jan. 13, 2004). Plaintiffs later amended their complaints to include damages based on a partial breach of contract. *Compare* Compl. filed Jan. 13, 2004, No. 04-34C, at ¶¶ 56-63, and Compl. filed Jan. 13, 2004, No. 04-36C (alleging only uncompensated taking) *with* Am. Compl. filed Dec. 2, 2004, No. 04-34C, at ¶¶ 76-91, and Am. Compl. filed Dec. 2, 2004, No. 04-36C (complaints with three counts including breach of contract, breach of implied covenant of good faith and fair dealing, and uncompensated taking). On January 21, 2005, *Atl. City Elec. Co.*, No. 04-36C, was consolidated with *Delmarva Power & Light* and assigned to the undersigned. Both Delmarva and ACE were owners of minority interests in Salem and Peach Bottom; Atlantic held an ownership interest in Hope Creek, as well. They sold these ownership interests to PSEG and PECO Energy Company

[1] The following background information is gleaned from plaintiffs' amended complaints and from the various briefs and exhibits accompanying the parties' motions over the last three years of litigation. This recitation of the background does not constitute findings of fact by the court.

("PECO")[2] by Purchase Agreements dated September 27, 1999. Plaintiffs seek damages, alleging that DOE's failure to dispose of SNF reduced the value of their property and caused plaintiffs to receive a diminished price when they sold their interests to PSEG and PECO.

DOE's failure to dispose of SNF has been the topic of several cases and generated a number of opinions before the Court of Federal Claims principally dealing with the type and amount of damages that can be awarded. *See, e.g.*, *Sys. Fuels, Inc. v. United States*, No. 03-2623C, 2007 WL 3033659 (Fed. Cl. Oct. 16, 2007); *S. Nuclear Operating Co. v. United States*, 77 Fed. Cl. 396 (2007); *Vt. Yankee Nuclear Power Co. v. United States*, 73 Fed. Cl. 236 (2006); *Rochester Gas and Elec. Co. v. United States*, 65 Fed. Cl. 431 (2005); *Boston Edison Co. v. United States*, 64 Fed. Cl. 167 (2005). The history of DOE's failure to dispose of SNF has been sufficiently chronicled in these and other cases. *See also Me. Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1337-39 (Fed. Cir. 2000).

Briefly restated, the relevant history began in 1982 when Congress acknowledged that the disposal of nuclear waste was a matter of nationwide concern implicating commercial, health, and national security concerns and enacted the NWPA. The NWPA authorized the Secretary of Energy to enter into contracts with utilities for the disposal of SNF and high-level radioactive waste. *See* 42 U.S.C. § 10222(a)(1). The Act effectively made entry into these contracts mandatory for the utilities by prohibiting the Nuclear

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[2] PECO later merged with Unicom, the owner of Commonwealth Edison, to become Exelon Generation Company ("Exelon").

Regulatory Commission from issuing licenses to any operator who has not "entered into a contract with the Secretary" or who "is [not] actively and in good faith negotiating with the Secretary for a contract." *Id.* § 10222(b)(1)(A). The NWPA required that all such contracts "shall provide that" DOE will dispose of the waste "beginning not later than January 31, 1998." *Id.* §10222(a)(5)(B). DOE drafted a Standard Contract for Disposal of Spent Nuclear Fuel and promulgated it through the rule-making process. 10 C.F.R. § 961.11 (the "Standard Contract") (1983). The Standard Contract required utilities to pay DOE fees, including a one-time fee and ongoing fees based on the amount of electricity generated, in exchange for SNF disposal service. As the Act required, the con-tract obligated DOE to take title to, transport, and dispose of the nuclear waste stored at the utilities' facilities beginning "not later than January 31, 1998." *Id.* at art. II. In 2000 the United States Court of Appeals for the Federal Circuit held that DOE's failure to take SNF by January 31, 1998, constituted a partial breach of the Standard Contract. *Maine Yankee*, 225 F.3d at 1343. In effect, DOE is liable for partial breach of every contract into which it has entered with every commercial operator of nuclear power plants in the United States. The various cases before the Court of Federal Claims generally are limited to determining the nature and extent of damages caused by DOE's partial breach.

PROCEDURAL HISTORY

Plaintiffs filed their complaints on January 13, 2004. On May 12, 2004, before the undersigned took *Atlantic City* from Judge George W. Miller, defendant moved to dismiss for failure to state a claim in *Delmarva Power & Light*, arguing that no cognizable

takings claim had been stated. In briefs supporting the motion to dismiss, defendant argued, *inter alia*, that plaintiffs' takings claims must fail because they were predicated upon a breach of contract with the Government. In responding, plaintiffs expressed some concern that defendant was challenging the validity of plaintiffs' assignments of their various rights to PSEG and PECO under the so-called Anti-Assignment Acts.[3] For these reasons on December 2, 2004, plaintiffs amended their complaints to include claims for partial breach of contract and breach of the implied covenant of good faith and fair dealing. Counsel for plaintiffs described this as a "protective matter." Transcript of Proceedings, *Atl. City Elec. Co. v. United States*, No. 04-36C, at 31 (Fed. Cl. Dec. 3, 2004) (G. Miller, J., presiding). With the filing of the amended complaint in *Delmarva Power & Light*, the court by order of December 3, 2004, deferred ruling on the motion to dismiss. On January 21, 2005, *Atl. City Elec. Co. v. United States*, No. 04-36C, was consolidated with *Delmarva Power & Light*. Its procedural history tracked that of *Delmarva Power & Light*.

Following consolidation, the court ordered defendant to file a renewed motion for summary judgment in both cases; defendant did so on April 28, 2005. After extensive briefing, the court determined that a

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[3] Two statutes, 41 U.S.C. § 15 (2000), and 31 U.S.C. § 3727 (2000), concern the assignment of contracts with the United States and claims against the United States, respectively. They often are referred to collectively as the "Anti-Assignment Acts" because they proscribe the voluntary assignment of contracts or claims against the United States other than pursuant to a statutorily established scheme. A fuller discussion of these statutes and their application to these cases appears in the discussion portion of this opinion. *See infra* part II.1.3).

more fully developed record would be required and on July 1, 2005, it denied defendant's motion for summary judgment without prejudice. Over the next year and one half, the parties engaged in discovery. Then, on January 5, 2007, defendant filed a motion to consolidate this action with *PSEG Nuclear L.L.C. and Pub. Serv. Elec. and Gas Co. v. United States*, No. 01-551C (Fed. Cl. filed Sept. 26, 2001), or, in the alternative, to issue a summons joining PSEG as a third-party defendant in the instant cases. PSEG currently owns and operates all three nuclear power plants involved in these cases. In its motion for consolidation, defendant argued that common issues of fact and of law required consolidation; defendant was concerned particularly with the specter of inconsistent or duplicative judgments. Def.'s Br. filed Jan. 5, 2007, at 6-13. On plaintiffs' motion, on January 18, 2007, the court stayed the discovery schedule pending resolution of that motion for consolidation.

The purchase agreements for the nuclear power plants between plaintiffs and PSEG provide for binding arbitration for "any dispute between [PSEG] and [plaintiffs] . . . relating to or arising out of any provision of" those purchase agreements. *See* Purchase Agreement by and Between Atlantic City Electric Company and PSEG Power LLC, Sept. 27, 1999, § 10.6 (filed in No. 04-34C on Aug. 23, 2007) (the "PAs").[4] Immediately after defendant's

[4] The several purchase agreements between Delmarva, ACE, and PSEG are almost identical. Their differences are slight and concern only the identification of which minority ownership interest in which plant is being conveyed. All of the substantive portions of the purchase agreements relevant to this matter are identical. For the sake of convenience, the purchase agreements will be referred to collectively as the "PAs."

January 5, 2007 motion to consolidate, PSEG sent plaintiffs a Notice of Dispute under the PAs. PSEG took the position that, through the purchase agreement, plaintiffs had assigned to PSEG and to Exelon whatever claims against DOE they might have had in connection to the purchased assets (the interest in the nuclear power plants and the associated SNF), regardless of the legal nature of those claims, *i.e.*, regardless of whether those claims arose under a theory of partial breach of contract or constituted takings without just compensation. Plaintiffs argued that PSEG's delay in seeking arbitration and conduct in the course of litigation constituted a waiver of PSEG's right to pursue arbitration. Following briefing, on March 27, 2007, the court issued an order to show cause to plaintiffs and defendant whether the court should grant a stay pending the resolution of the arbitration unless the arbitrators, in resolving the dispute, would consider plaintiffs' arguments concerning delay, laches, waiver, and/or estoppel. On April 5, 2007, PSEG served plaintiffs with an arbitration demand, pursuant to the Notice of Dispute. On April 12, 2007, the court stayed the cases for 90 days, *nunc pro tunc*, from March 6, 2007, to June 4, 2007, in order to allow for completion of the binding arbitration.

After demanding arbitration, PSEG sought a stay in its own case before Sr. Judge Bohdan A. Futey, *PSEG Nuclear L.L.C.*, No. 01-551C (Fed. Cl. filed Sept. 26, 2001). Copies of PSEG's briefs from that case were filed as appendices to defendant's briefs in this case relating to the motions pending before the stay. In the case before Sr. Judge Futey, PSEG had argued that such a stay was mandatory under Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3

(2000) ("FAA"), which requires stays where the court is "satisfied that the issue is referable to arbitration."

A strong federal policy favors arbitration, *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and, under the FAA, trial courts generally are obligated to grant a stay where "'satisfied' that the issue involved in the case [is] referable to arbitration," *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372 (Fed. Cir. 2006). However, the United States is not a party to the arbitration agreements that formed the basis of PSEG's demand for dispute resolution and binding arbitration, which are contained in the PAs between PSEG and plaintiffs. Therefore, section 3 of the FAA did not apply in this case, and a stay was not absolutely mandated. *See, e.g. Adams v. Ga. Gulf Corp.*, 237 F.3d 538, 541-42 (5th Cir. 2001) ("The denial of the benefit of the mandatory stay provision to non-signatories has been grounded in the recognition that the non-signatory's litigation with an arbitrating party cannot be referred to arbitration"); *Nederlandse Erts-Tankersmaatschappij, N.F. v. Isbrandtsen Co.*, 339 F.2d 440, 441 (2d Cir. 1964) (granting of stay not justified under FAA where defendants are not parties to arbitration agreement).

As the United States Supreme Court has stated, the power to stay cases "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for the litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) (citations omitted). Ultimately, neither plaintiffs nor defendant were able to

show cause as to why the action should not be stayed. The court's stay of the cases on April 12, 2007, issued because the arbitration between plaintiffs and PSEG appeared, in its judgment, likely to determine issues between the parties relevant to plaintiffs' pending litigation in the instant case, not because the FAA mandated a stay.

The binding arbitration continued, and the arbitral panel issued its opinion on June 20, 2007. *PSEG Power, LLC & PSEG Nuclear, LLC v. Pepco Holdings, Inc., Atl. City Elec. Co. & Delmarva Power & Light Co., Atl. City Electric Co. & Delmarva Power & Light Co. v. PSEG Power, LLC & PSEG Nuclear, LLC* (Arb. Jun. 20, 2007) (Mukasey, Loftus, & Aldock, Arbs.). The panel held that the issues were arbitrable, *id.* at 10; that PSEG did not waive its claims by delay, laches, waiver, or estoppel, *id.* at 10-17; and that plaintiffs assigned whatever takings claims they might have had to PSEG through the PAs. *Id.* at 17- 24. *But see id.* at 25-26 (separate opinion of John Aldock dissenting from majority, suggesting that PSEG forfeited its claim to arbitration through litigation conduct and laches, and that Court of Federal Claims should have decided such waiver issues). On June 22, 2007, PSEG filed its request with the Superior Court of New Jersey Chancery Division, Mercer County, to confirm the arbitration panel award. *PSEG Power, LLC & PSEG Nuclear, LLC v. Atl. City Elec. Co. & Delmarva Power & Light Co.*, No. C-59-07 (N.J. Super. Ct. Ch. Div. June 22, 2007).

On July 2, 2007, plaintiffs moved this court to vacate the arbitration ruling, alleging that the question of waiver was for the court to decide, not the arbitral panel, and again arguing that PSEG waived

its right to seek arbitration. Plaintiffs' argument relied primarily on the opinion of the United States Court of Appeals for the Third Circuit in *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207 (3d Cir. 2007), issued on April 6, 2007, three months after PSEG's Notice of Dispute, one day after PSEG's arbitration demand, and just days before this court's April 12, 2007 order to show cause. On July 19, 2007, the court granted PSEG's motion to intervene in these cases for the limited purpose of opposing plaintiffs' motion to vacate the arbitration.

During argument on the motion and following briefing, the court asked defendant to take a position, for the record, with regard to the assignments of rights that plaintiffs provided to PSEG and to Exelon. On August 22, 2007, defendant filed a notice stating that the Government "accepted the assignments of those claims that the plaintiffs purported to make to PSEG Nuclear, to the extent that we have been made aware of those claims through the plaintiffs' complaint in this action and through the assignment provisions in the purchase and sale agreements that have been included in the appendices to some of the briefing in this case." Def.'s Notice filed Aug. 22, 2007, at 3. Following defendant's express acceptance of the assignments in question, the court requested supplemental briefing with responses to the following six questions:

1. If the PAs transferred all extant claims as of September 27, 1999, were plaintiffs' takings claims in existence at the effective date of transfer?

2. What effect does defendant's notice formally accepting plaintiffs' assignment of claims to PSEG have on plaintiffs' maintenance of

a suit under a theory of retained takings claims?

3. Can an independent takings claim be maintained concurrently with a breach of contract claim pursuant to the Standard Contract? If not, how can a takings claim be maintained separately by bifurcating the claims through an assignment of the contract claims to a third-party?

4. If the court enters an order ruling that plaintiffs have no takings claims because the source of their claims was a viable contract at the time that the putative takings claim arose, *see Detroit Edison v. United States*, 56 Fed. Cl. 299, 302 (2003), can any takings claims survive?

5. If the source of the takings claims is independent from the Standard Contract and/or arises from a statute or regulation, *see Boston Edison*, 64 Fed. Cl. 167, 187 (2005), what precisely is that source? Can the source of the right be resolved as a matter of law? If such an independent source exists, on what date did each takings claim arise?

6. If the court cannot resolve plaintiffs' takings claims at this juncture, should plaintiffs's case be consolidated with PSEG's earlier-filed case? *See Vt. Yankee Nuclear Power Corp. v. United States*, 73 Fed. Cl. 236, 242 (2006).

Order entered Aug. 30, 2007. The court also asked defendant to "state for the record whether it renews its motion to dismiss filed May 12, 2004, for purposes

of the court's final ruling." *Id.* at 5. In its response dated September 12, 2007, defendant did so, renewing with respect to both cases its motion to dismiss or, in the alternative, its motion for summary judgment, originally filed April 28, 2005, as supplemented by subsequent briefing.

DISCUSSION

I. The motion to vacate the arbitration ruling

1. Determining waiver in an arbitration context and plaintiff's assertion of Ehleiter

A strong presumption favors finding a matter to be arbitrable. In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), the Supreme Court examined the role of judges in resolving issues related to arbitration. The Court held that gateway questions of arbitrability are presumptively for the court to decide. These gateway questions, however, are limited to disputes that the "contracting parties would likely have expected a court to have decided . . . where they are not likely to have thought that they had agreed that an arbitrator would do so," *id.* at 83-84, which is to say, "whether the parties are bound by a given arbitration clause" and whether such a clause "applies to a particular type of controversy." *Id.* By contrast, "procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide." *Id.* at 84. These procedural questions include traditional allegations of "waiver, delay, or a like defense to arbitrability." *Id.* The Supreme Court affirmed this division of labor between the courts and arbitrators in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

In *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207 (3d Cir. 2007), however, the Third Circuit observed that it had "long decided questions of waiver *based on litigation conduct* instead of referring the issue to an arbitrator." *Id.* at 217 (emphasis added). The Third Circuit, in recounting the only other post-*Howsam* and *Green Tree* case in which a federal court of appeals considered this division of labor between the courts and arbitrators, noted that the language of the FAA only required courts to issue a stay in an action pending arbitration if "'the applicant for the stay is not in *default* in proceeding with such arbitration.'" *Ehleiter*, 482 F.3d at 218 (quoting 9 U.S.C. § 3). The Third Circuit understood this to be a statutory mandate that, at least "in cases where a stay is sought," courts should themselves "decide the waiver issue" presented by litigation conduct. *Id.* The court also considered "comparative expertise considerations" informing the Supreme Court's resolution of who should decide issues of waiver by litigation conduct. *Id.* Litigation conduct necessarily implicates "judicial procedures," and the Third Circuit recognized that courts, not arbitrators, are best situated to determine whether litigative conduct constitutes an abuse of judicial proceedings. *Id.* For that reason the court in *Ehleiter* held emphatically that "waiver of the right to arbitrate based on litigation conduct remains presumptively an issue for the court to decide." *Id.* at 221.

Plaintiffs argue in their motion to vacate the arbitration proceeding that this court, not the arbitral panel, should have decided whether PSEG waived its right to seek arbitration under the PAs. Plaintiffs note that PSEG's "arbitration demand came 40 months after Plaintiffs' representatives met with PSEG's representatives in September 2003 to discuss Plaintiffs'

intention to file takings claims against DOE" and "22 months after" plaintiffs filed suit in the instant action. Pls.' Br. filed Jul. 2, 2007 at 11. Further, plaintiffs charge that PSEG was "not only aware of, but actively participated in, this litigation" by opposing a motion to compel production of certain documents, by later producing those documents and presenting witnesses at depositions, and responding to the court's March 27, 2007 order to show cause. *Id.* at 12.

It is important to note that plaintiffs do not assert that the court should vacate the arbitration ruling under the terms of the FAA. Under the FAA district courts may vacate an arbitration award where one of the following is present: (1) fraud in procuring the award; (2) partiality on the part of the arbitrators; (3) gross misconduct by the arbitrators; or (4) failure of the arbitrators to render a mutual, final, and definite decision. 9 U.S.C. § 10; *see Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d 1362, 1365, 1367 (Fed. Cir. 2001). Plaintiffs do not contend that any of these four grounds is applicable. Instead, plaintiffs base their objection on *Ehleiter*'s holding that, in the circumstances presented by the cases at bar, the court, not the arbitral panel, should have decided whether PSEG's litigation conduct constituted a waiver of its right to seek arbitration and contend that PSEG's conduct so constituted a waiver. Plaintiffs' understanding of the reasoning employed by the Third Circuit in *Ehleiter* is substantially correct: when two parties have engaged in litigation before a particular court, that court is best situated to resolve the question of waiver by litigation conduct, because such a question necessarily involves understanding the conduct that has been before the court and implicates judicial procedures. Unfortunately for plaintiffs, while

the reasoning in *Ehleiter* is sound, it does not apply to the facts of this case.

It is important to note that the "comparative expertise considerations" that militate having a court and not the arbitrators decide questions of waiver of arbitrability by litigation conduct that the court in *Ehleiter* discussed assume a situation in which the two litigants have been engaging in litigative conduct before the court on an ongoing and involved basis as opposing parties to the dispute. Plaintiffs filed suit against the United States as a defendant, not PSEG. Any consideration of a court's "comparative expertise" is necessarily limited to its percipient understanding of the litigative conduct as between the parties to the litigation that occurred in motions and arguments before the court. These cases have not been consolidated with the earlier case of *PSEG Nuclear L.L.C.*, No. 01-551C (Fed. Cl. filed Sept. 26, 2001), which is currently pending before Sr. Judge Futey. Nor has PSEG been allowed to intervene generally; it is an intervenor-defendant only for the purposes of this motion to vacate the arbitration ruling. Plaintiffs take the position that PSEG became an active litigant in these cases by opposing a motion to compel production of certain documents, by later producing those documents and presenting witnesses at depositions, and by responding to the court's March 27, 2007 order to show cause. Pls.' Br. filed July 2, 2007, at 12. To characterize such actions as voluntary and ongoing involvement in this dispute between plaintiffs and defendant is strained. Instead, these actions are responsive in nature and do not represent an attempt by PSEG to appear before the court as a litigative forum in the context of this particular controversy between plaintiffs and the

Government.[5] Ultimately, however, the court must deny plaintiffs' motion to vacate the arbitration ruling because the court lacks jurisdiction over disputes between private parties.

2. Whether the United States Court of Federal Claims has jurisdiction over private arbitration between plaintiffs and PSEG

The Court of Federal Claims, like all federal courts, is a court of limited jurisdiction. The court's jurisdiction is set forth primarily in the Tucker Act, codified as 28 U.S.C. § 1491. It grants the court "jurisdiction to render judgment upon *any claim against the United States* founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2000) (emphasis added). This grant of jurisdiction constitutes a waiver of sovereign immunity by the United States. "It long has been established, of course, that the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Testan*, 424 U.S. 392, 399 (1976) (alteration in original) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Thus, the Court of Federal Claims

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[5] The arbitral panel's majority opinion describes PSEG's conduct in a similar manner. *See PSEG Power, LLC & PSEG Nuclear, LLC v. Pepco Holdings, Inc., Atlantic City Elec. Co. & Delmarva Power & Light Co., Atlantic City Electric Co. & Delmarva Power & Light Co. v. PSEG Power, LLC & PSEG Nuclear, LLC*, at 13-17 (Arb. Jun. 20, 2007) (Mukasey, Loftus, & Aldock, Arbs.).

has no jurisdiction over a cause of action except to the extent that Congress has waived sovereign immunity. *Id.* Moreover, "in a Court of Claims context, . . . a waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Id.* (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). Given this construction, the jurisdiction of the Court of Federal Claims extends as far, but only as far, as the United States has consented to suits against it. "The jurisdiction of the Court of Federal Claims is prescribed by the metes and bounds of the United States' consent to be sued in its waiver of immunity." *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461 (Fed. Cir. 1998).

The Court of Federal Claims and its predecessor courts have never possessed jurisdiction to adjudicate disputes between private parties. *See Sherwood*, 312 U.S. at 588-89 ("We think it plain that the present suit could not have been maintained in the Court of Claims because the court is without jurisdiction of any suit brought against private parties . . . ."); *see also Nat. City Bank of Evansville v. United States*, 143 Ct. Cl. 154, 163 F. Supp. 846, 852 (1958) ("It is well established that the jurisdiction of this court extends only to claims against the United States, and obviously a controversy between private parties could not be entertained."). The Court of Federal Claims was established to provide a forum for the vindication of public rights, *i.e.*, to provide a mechanism for holding government accountable to suits by private citizens. The court lacks jurisdiction over private rights implicated in a dispute between private parties. *See Fisherman's Harvest, Inc. v. PBS&J*, 490 F.3d 1371, 1376-78 (Fed. Cir. 2007).

The arbitration ruling in question is the product of private agreements between plaintiffs and PSEG. The genesis of the right to arbitrate lies in the PAs between private parties, not any agreement involving the Government or implicating the sovereign. Regardless of the merits of plaintiffs' argument that PSEG's conduct – whether in the course of litigation or otherwise – constitutes a waiver of its right to seek arbitration, this court does not possess the power to disturb an arbitration created by an agreement between private parties and involving only those private parties. For this reason plaintiffs' motion to vacate the arbitration ruling is denied.

II. Defendant's renewed motion for summary judgment

In its order entered on August 30, 2007, the court asked defendant to "state for the record whether it renews its motion to dismiss filed May 12, 2004, for purposes of the court's final ruling." Order entered Aug. 30, 2007, at 5. In its response dated September 12, 2007, defendant did so, renewing for both cases its motion to dismiss or, in the alternative, its motion for summary judgment, originally filed April 28, 2005, as supplemented by subsequent briefing. Defendant's original May 12, 2004 motion to dismiss in *Delmarva Power & Light*, filed pursuant to RCFC 12(b)(6), alleged that plaintiffs failed to state a claim for which relief could be granted. Broadly speaking, in that motion to dismiss, defendant argued that plaintiffs did not identify any cognizable claim for a taking of any property.[6] Defendant's original April 28,

[6] Defendant's May 12, 2004 motion to dismiss was in response to plaintiffs' original complaints. The original complaints included only takings claims; the so-called "protective" claims for partial breach of contract and breach of the implied covenant of

2005 motion for summary judgment, pursuant to RCFC 56, argued: that plaintiffs purported to assign all of their claims through the PAs, whether those claims arose under a takings or a contracts theory; that, in any event, plaintiffs' requests for diminished value and restitution damages were not proper remedies under a contract claim; that plaintiffs had not identified a cognizable claim for a taking of property; and, that plaintiffs' payment of fees to the SNF fund did not constitute a taking.

1. Standard of review

1) Summary judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RCFC 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The legal issues before the court may be resolved on summary judgment. *Long Island Sav. Bank, FSB v. United States*, No. 2006-5029, ___ F.3d ____, 2007 WL 2685640, at *7 (Fed. Cir. Sept. 13, 2007).

2) Takings claims and cognizable property interests

The Federal Circuit has held that determining "[w]hether a compensable taking has occurred is a question of law based on factual underpinnings." *Members of Peanut Quota Holders Ass'n, Inc. v. United States*, 421 F.3d 1323, 1329 (Fed. Cir. 2005);

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good faith and fair dealing were raised by plaintiffs only in their amended complaints.

see Wyatt v. United States, 271 F.3d 1090, 1096 (Fed. Cir. 2001). In evaluating whether a governmental action effects a taking of private property without just compensation, the court must first determine whether the claimant has established a cognizable property interest, *i.e.*, one protected by the Fifth Amendment. *Conti v. United States*, 291 F.3d 1334, 1339 (Fed. Cir. 2002). If a property right has been established, the court then must determine whether the Government has taken it in part or in whole. The traditional concept of a taking posits a physical appropriation or physical invasion of private property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982). The Supreme Court nonetheless long has accepted that a taking can occur when the Government regulates use of property, even in the absence of a physical taking or invasion. Regulatory takings jurisprudence recognizes that if "a regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

3) Assignments of contracts with and claims against the Government

Two statutes apply to restrict the manner in which contracts with the Government and claims against the Government can be assigned voluntarily: 41 U.S.C. § 15 and 31 U.S.C. § 3727 (2000).[7] They are often referred to as the "Assignment of Claims Act" or the

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[7] The second of these statutes was formerly codified at 31 U.S.C. § 203. In 1982 title 31 of the U.S. Code was substantially reorganized. Pub. L. No. 97-258, 96 Stat 877 (1982). This statute was recodified at 31 U.S.C. § 3727 without substantive change. *See id.* The recitation of case law that follows in this section involves cases adjudicated before 1982, so those courts referred to 31 U.S.C. § 203, not § 3727.

"Anti-Assignment Act," collectively. *See United Bonding Ins. Co. v. Catalytic Constr. Co.*, 533 F.2d 469, 471 (9th Cir. 1976) ("The Assignment of Claims Act . . . provides that . . . ."). The relevant portion of the first of these statutes, 41 U.S.C. § 15, reads:

> No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

41 U.S.C. § 15(a) (2000). This statute serves to restrict generally the assignment of any interest in a contract with the United States to any other party, with a few exceptions pertaining largely to the assignment of moneys due under a contract with the United States to a bank or similar financial institution. *See* 41 U.S.C. § 15(b). Any purported assignment of a contract with the United States not only is invalid, but it causes the annulment of the contract "so far as the United States is concerned." 41 U.S.C. § 15(a).

The second statute, 31 U.S.C. § 3727, applies more generally to "a claim against the United States . . . ." 31 U.S.C. § 3727(a)(1) (2000). The relevant portion of the statute restricts generally the assignment of claims against the United States outside of a restricted procedure.

> An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been

> issued. The assignment shall specify the warrant, must be made freely, and must be attested to by 2 witnesses. The person making the assignment shall acknowledge it before an official who may acknowledge a deed, and the official shall certify the assignment. The certificate shall state that the official completely explained the assignment when it was acknowledged. An assignment under this subsection is valid for any purpose.

31 U.S.C. § 3727(b). The statute thus establishes that assignments of claims against the Government are void unless they comply with the restrictions of 31 U.S.C. § 3727(b). By the terms of the statute, claims that have not yet been pursued in court to final judgment necessarily are precluded from assignment. The two statutes often are referred to collectively because together they serve to preclude generally the voluntary assignment of legal rights as against the Government to third parties and because they embody similar principles. It is helpful, however, to understand the "conceptual difference between the statutes," which is that 31 U.S.C. § 3727 "pertains to claims for work already done," while 41 U.S.C. § 15, "involving executory contracts, is more concerned with continuing obligations." *Tuftco Corp. v. United States*, 614 F.2d 740, 744 n.4 (Ct. Cl. 1980). This explains why assignments of claims are void *ab initio* pursuant to 31 U.S.C. § 3727, but, pursuant to 41 U.S.C. § 15, assignments of executory contracts are both void and annul the contract and its concomitant obligations "so far as the United States is concerned." 41 U.S.C. § 15(a).

The Supreme Court has held on more than one occasion that "primary purpose" of these statutes "was undoubtedly to prevent persons of influence

from buying up claims against the United States, which might then be improperly urged upon officers of the Government." *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 373 (1949). Two other important goals of the Assignment of Claims Act were

> (1) to insure that the United States may avoid involvement in any litigation as to the existence or extent of subrogation or other assignment of such claims; and (2) to insure that the suits and any judgments against the United States will be in the names of the original claimants so that the United States will be able to avail itself of its statutory rights in respect of venue, and of counterclaim and offset on account of any cross-claims it may have against the original claimants.

Id. at 371; *see e.g., United States v. Shannon*, 342 U.S. 288, 283 (1952) (noting similar purpose for enactment). The Government is the only party that can properly invoke the Assignment of Claims Act, because "provisions of the statute making void an assignment or power of attorney by a Government contractor *are for the protection of the Government*." *Aetna*, 338 U.S. at 371 (emphasis added). Because the general prohibition on assignment of contracts and claims is intended for the protection of the Government, courts also have held that the Government may, by word or deed, recognize and accept an assignment, even where such an assignment otherwise did not comply with the terms of the Assignment of Claims Act. *See, e.g., Tuftco Corp. v. United States*, 614 F.2d 740, 746 (Ct. Cl. 1980) ("Consistent with the situations in which [the Act] has been deemed inapplicable stands the long-recognized principle that . . . the Government, if it chooses to do so, may recognize an assignment."); *United Pac. Ins. Co. v.*

United States, 358 F.2d 966, 970 (Ct. Cl. 1966) ("[D]efendant has now withdrawn any objection it might have had to the validity of the assignment. . . . In the absence of any attack upon the assignment by defendant, we feel bound, following the dictates of equitable policy and sound precedent, to recognize the assignment and treat it as valid and binding between the parties.").[8]

2. Plaintiffs assigned all claims with respect to and arising out of the SNF to PSEG

Defendant and PSEG contend that plaintiffs cannot assert their takings and contracts claims, whatever the merits of those claims, because plaintiffs assigned whatever claims they had regarding DOE's failure to dispose of SNF to the buyers of the nuclear plants, PSEG and PECO (now Exelon), by the terms of the PAs. Plaintiffs respond that the assignments of their contract claims were invalid *ab initio* by operation of the Assignment of Claims Act and, as a consequence, that they retain the right to pursue their claims against the Government. Plaintiffs also contend that the language of the PAs did not include an assignment of their takings claims. In the alternative, plaintiffs posit that, in any case, the

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[8] Plaintiffs have asserted that takings claims may never be assigned. *See* Pls.' Br. filed Sep. 12, 2007, at 14-16. They rely primarily on misreadings of the relevant Supreme Court precedent. *Shannon* stood only for the principle that an otherwise unrecognized voluntary assignment of claims remains invalid, even when the assignor joins as a party the assignee. *Shannon*, 342 U.S. at 284-85. Plaintiffs' contend that *United States v. Dow*, 357 U.S. 17 (1958), also stands for the proposition that the assignment of takings claims is prohibited as a general proposition. The holding in *Dow* concerned primarily establishing when a taking occurs, not whether the assignment of takings claims is permissible. *Id.* at 20-23.

Assignment of Claims Act precludes the assignment of their takings claims and that any such purported assignment would be invalid *ab initio*.

1) The Government's acceptance of the assignments

The Assignment of Claims Act operates for the benefit of the Government; its provisions are intended to protect the Government from voluntary assignments of contracts or claims to parties where it has not consented to or recognized the assignment. The Government's recognition and acceptance of such an assignment makes it a valid assignment. *See supra* Part II.1.3); *see also Maffia v. United States*, 163 F. Supp. 859, 862 (Ct. Cl. 1958) ("Despite the bar of the [Assignment of Claims Act], the Government, if it chooses to do so, may recognize an assignment."). During argument on the motion to vacate and following briefing, the court asked defendant to take a position, for the record, with regard to the assignments of rights that plaintiffs provided to PSEG and to Exelon. On August 22, 2007, defendant filed a notice "exercising its sole discretion to accept the assignments of those claims that the plaintiffs purported to make to PSEG Nuclear, to the extent that we have been made aware of those claims through the plaintiffs' complaint in this action and through the assignment provisions in the purchase and sale agreements that have been included in the appendices to some of the briefing in this case." Def.'s Notice filed Aug. 22, 2007, at 3. This express acceptance of the assignments serves to vitiate the provisions of the Assignment of Claims Act that otherwise would preclude the assignment of contracts with, or claims against, the United States. For this reason all assign-

ments of such contracts and claims that plaintiffs made in the PAs are valid.[9]

2) The subject matter assigned in the PAs

Section 2.1 of the PAs described those assets that the sellers (plaintiffs) would transfer to purchasers (PSEG and PECO) in the course of the sale of the nuclear plants. Determining what purportedly was assigned by plaintiffs in the PAs requires interpreting the relevant provisions of the PAs. Contract interpretation "begins with the plain language of the written agreement." *Hercules, Inc. v. United States*, 292 F.3d 1378, 1380-81 (Fed.Cir.2002); *see also Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1543 (Fed.Cir.1993) ("A contract is read in accordance with its express terms and the plain meaning thereof.").

Subsection 2.1(*l*), the relevant portion of the PAs, includes as one of the "Purchased Assets"

> All claims of Seller relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract (including all claims for failure by the Department of Energy to take Spent Nuclear Fuel) accrued prior to, on or after the Closing Date, whether relating to periods prior to, on or after the Closing date, and all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Pur-

[9] This notice accepting assignments resolves any previous ambiguity or inconsistency in the Government's position on the validity of these assignments.

> chased Assets, other than the claims described in Section 2.2(*l*) . . . .[10]

PAs § 2.1(*l*). No dispute can be marshaled that the plain language of this provision expressly assigns the right to pursue breach of contract claims against DOE for its failure to take SNF.[11]

Plaintiffs nonetheless assert that "[t]here is no reasonable interpretation that Plaintiffs' takings claims are in any way included within the scope of this section . . . . Plaintiffs' takings claims are not based on the Standard Contract and do not emanate from that Contract. Rather, Plaintiffs' takings claims are based on its rights under the U.S. Constitution and are separate and apart from the Standard Contract with DOE." Pls.' Br. filed Sept. 12, 2007, at 5. Indeed, plaintiffs take pains to note:

> The three PAs are each approximately eighty-three pages long, single spaced, before including exhibits, attachments, and schedules. The par-

---

[10] Section 2.2(*l*) excludes from the Purchased Assets only certain "Department of Energy Decommissioning and Decontamination Fees" that are not the subject of this dispute.

[11] Plaintiffs have admitted that they raised the claims for partial breach of contract in their amended complaints as a "protective" measure, after expressing concern that the Government would take inconsistent positions as to its acceptance of the assignment of the Standard Contract and any rights to pursue an action for partial breach of the Standard Contract. Transcript of Proceedings, *Atl. City Elec. Co. v. United States*, No. 04-36C, at 31 (Fed. Cl. Dec. 3, 2004). Plaintiffs have also admitted, in their opposition to defendant's original motion for summary judgment of April 28, 2005, that, "[t]o the extent that the government is willing to [accept the transfer of the relevant breach of contract claims], Delmarva and Atlantic would be willing to dismiss the breach claims in the amended complaints." Pls.' Br. filed May 25, 2005, at 9.

> ties expressly retained sophisticated counsel to advise them and to draft these extremely detailed documents. There is no claim by any party to these proceedings that these PAs are in any way ambiguous on these issues or require the use of parol evidence to make sense of them. Yet, nowhere in these PAs do the parties express any intent or desire to transfer claims grounded on the U.S. Constitution or arising under the Constitution. Had the parties desired to do so, it would have been a relatively easy matter to include a separate clause providing that all Plaintiffs' claims arising under or grounded on the U.S. Constitution were transferred to PSEG and/or that those claims were no longer the property of Plaintiffs.

Id. Plaintiffs' contentions, however, do not flow from the plain language of the written agreement. Section 2.1(*l*) of the PAs transferred to buyers not only "[a]ll claims of Seller relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract," but also "*all other claims* of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets . . ." PAs § 2.1(*l*) (emphasis added). The SNF was one of these Purchased Assets, *see* PAs §§ 2.1(b)-2.1(d), and plaintiffs' takings claims, whatever their merits, are "claims of the Seller against the Department of Energy with respect to, arising out of, or in connection with" that SNF.[12]

---

[12] Because plaintiffs have assigned all their claims related to the SNF to PSEG and PECO, including whatever takings claims they might have otherwise pursued, the court declines to comment on the merits of such takings claims.

3) No genuine issue of material fact

Summary judgment is appropriate when there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RCFC 56(c); *see also Anderson*, 477 U.S. at 247-48. It is particularly important to note that a "critical factor in a motion for summary judgment" is "the determination by the court that there is no *genuine* issue of *material* fact." *Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd.*, 731 F.2d 831, 835 (Fed. Cir. 1984). Attorney argument asserting a genuine issue of material fact is insufficient to oppose successfully a motion for summary judgment. "The party opposing the motion must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant. Mere denials or conclusory statements are insufficient." *Id.* at 836. Plaintiffs have failed to point to any such evidentiary conflict at all; the only disputed issues before the court are matters of law. Because plaintiffs assigned all of their claims against the Government pertaining to disposal of the SNF to PSEG and PECO, the court must grant defendant's motion for summary judgment.

CONCLUSION

Accordingly, based on the foregoing, defendant's motion for summary judgment is granted, and the Clerk of the Court shall enter judgment for defendant.

IT IS SO ORDERED.

No costs.

s/ Christine O.C. Miller

Christine Odell Cook Miller
Judge

APPENDIX C

The Constitution of the United States

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

APPENDIX D

31 U.S.C. § 3727 (2008). Assignments of claims

(a) In this section, "assignment" means—

(1) a transfer or assignment of any part of a claim against the United States Government or of an interest in the claim; or

(2) the authorization to receive payment for any part of the claim.

(b) An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. The assignment shall specify the warrant, must be made freely, and must be attested to by 2 witnesses. The person making the assignment shall acknowledge it before an official who may acknowledge a deed, and the official shall certify the assignment. The certificate shall state that the official completely explained the assignment when it was acknowledged. An assignment under this subsection is valid for any purpose.

(c) Subsection (b) of this section does not apply to an assignment to a financing institution of money due or to become due under a contract providing for payments totaling at least $ 1,000 when—

(1) the contract does not forbid an assignment;

(2) unless the contract expressly provides otherwise, the assignment—

(A) is for the entire amount not already paid;

(B) is made to only one party, except that it may be made to a party as agent or trustee for more than one party participating in the financing; and

(C) may not be reassigned; and

(3) the assignee files a written notice of the assignment and a copy of the assignment with the contracting official or the head of the agency, the surety on a bond on the contract, and any disbursing official for the contract.

(d) During a war or national emergency proclaimed by the President or declared by law and ended by proclamation or law, a contract with the Department of Defense, the General Services Administration, the Department of Energy (when carrying out duties and powers formerly carried out by the Atomic Energy Commission), or other agency the President designates may provide, or may be changed without consideration to provide, that a future payment under the contract to an assignee is not subject to reduction or setoff. A payment subsequently due under the contract (even after the war or emergency is ended) shall be paid to the assignee without a reduction or setoff for liability of the assignor—

(1) to the Government independent of the contract; or

(2) because of renegotiation, fine, penalty (except an amount that may be collected or withheld under, or because the assignor does not comply with, the contract), taxes, social security contributions, or withholding or failing to withhold taxes or social security contributions, arising from, or independent of, the contract.

(e)(1) An assignee under this section does not have to make restitution of, refund, or repay the amount received because of the liability of the assignor to the Government that arises from or is independent of the contract.

(2) The Government may not collect or reclaim money paid to a person receiving an amount under an assignment or allotment of pay or allowances authorized by law when liability may exist because of the death of the person making the assignment or allotment.

* * * * *

31 U.S.C. § 203 (1976). Assignments of claims; set-off against assignee [predecessor to 31 U.S.C. § 3727]

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: *Provided,*

1. That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

2. That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursu-

ant to this section, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or setoff, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or setoff for any liability of any nature of the assignor to the United States or any department or agency thereof which arises inde-

pendently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or non-withholding of taxes or social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this section shall be deemed to affect or impair rights or obligations heretofore accrued.

* * * * *

41 U.S.C. § 15 (2008). Transfers of contracts; assignments; assignee not subject to reduction or setoff

(a) Transfer. No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

(b) Assignment. The provisions of subsection (a) shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency, provided:

(1) That, in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment.

(2) That, unless otherwise expressly permitted by such contract, any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing.

(3) That, in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of the assignment with—

(A) the contracting officer or the head of his department or agency;

(B) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and

(C) the disbursing officer, if any, designated in such contract to make payment.

(c) Validity of assignment. Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section shall constitute a valid assignment for all purposes.

(d) Assignee liability. In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to

make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

(e) Amendment of contract. Any contract of the Department of Defense, the General Services Administration, the Department of Energy, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, upon a determination of need by the President, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or setoff. Each such determination of need shall be published in the Federal Register.

(f) Assignor liability arising independent of contract. If a provision described in subsection (e) or a provision to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract shall not be subject to reduction or setoff for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of—

(1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract;

(2) fines;

(3) penalties (which term does not include amounts which may be collected or withheld from the assignor

in accordance with or for failure to comply with the terms of the contract); or

(4) taxes, social security contributions, or the withholding or non withholding of taxes or social security contributions, whether arising from or independently of such contract.

(g) Accrued rights and obligations. Except as herein otherwise provided, nothing in this section shall be deemed to affect or impair rights or obligations heretofore accrued.

APPENDIX E

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DELMARVA POWER & LIGHT COMPANY, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	) No.04-0034C, into) which has been) consolidated No.) 04-0036C (Judge) Christine Miller))

DEFENDANT'S NOTICE REGARDING THE ASSIGNMENT OF PLAINTIFFS' CLAIMS, IN RESPONSE TO THE COURT'S INQUIRIES DURING THE PARTIES' HEARING ON AUGUST 22, 2007

In response to the Court's inquiry at today's hearing, defendant, the United States, clarifies its position with regard to the assignments of rights that the plaintiffs provided to PSEG Nuclear, LLC ("PSEG Nuclear"), and Exelon Generation Company ("Exelon").

As an initial matter, as we previously explained in prior briefing, it is clear that the Assignment of Claims Act was enacted for the protection of the Government, *see In re Ideal Mercantile Corp.*, 244 F.2d 828, 832 (2d Cir. 1957), *United States v. Shannon*, 342 U.S. 288, 291-92 (1955), and that only the Government may assert its protections. *See Martin v. National Surety Co.*, 300 U.S. 588, 594-95 (1937); *McKenzie v. Irving Trust Co.*, 323 U.S. 365 (1945). Because the Assignment of Claims Act works exclusively for the Government's protection, it is well-established that the Government may waive those

protections or otherwise recognize an assignment. *Tuftco Corp. v. United States,* 222 Ct. Cl. 277, 614 F.2d 740, 745 (1980); *see Vermont Yankee Nuclear Power Corp. v. United States,* 73 Fed. Cl. 236, 241 (2006) ("an assignment of claims is permissible where the assignment occurs by operation of law, or where the government chooses to 'recognize' the assignment of a claim"); *Riviera Fin. of Texas, Inc. v. United States,* 58 Fed. Cl. 528, 530 (2003) ("It is well established in the case law of this circuit that the Government can waive coverage of the Anti-Assignment Acts, as the Government concedes in this case"); *Maffia v. United States,* 143 Ct. Cl. 198, 163 F. Supp. 859, 862 (1958) ("the Government, if it chooses to do so, may recognize an assignment") (cited in *Riviera Fin.*, 58 Fed. Cl. at 530).

As we previously explained in our response to the plaintiffs' motion to vacate the arbitration decision, which we filed on July 19, 2007, the United States Supreme Court has tied the prohibition against the assignment of takings claims to the Assignment of Claims Act. *United States v. Dow,* 357 U.S. 17, 20 (1958). The plaintiffs have identified no valid reason that the same rule regarding waiver of the Assignment of Claims Act as they apply to contract claims is somehow different as they apply to takings claims.

With regard to the plaintiffs' assignments to Exelon at issue in this case, the Court is aware that we previously settled our disputes with Exelon amicably. Through that settlement, the Government understood that it was resolving all claims arising under the Standard Contracts to which Exelon was a party or had an interest and that all litigation relating to those contracts would be at an end, a settlement that

also included Exelon's takings claims against the Government. As part of that settlement, the Government fully understood that it included any and all assignments that Exelon had received associated with its Standard Contracts and/or relating to its nuclear reactors, as well as all claims associated with rights relating to those reactors. As a result, the Government accepted the assignments that the plaintiffs provided to Exelon, and they were incorporated into the settlement agreement between Exelon and the Government, extinguishing those claims. Given that the United States resolved all assignments associated with the Exelon contracts and reactors as part of the settlement with Exelon, the plaintiffs' contract and takings claims here, which they assigned to Exelon prior to the Government's settlement with Exelon, should be barred.

With regard to the PSEG Nuclear assignments, we are not aware of any notice to the Department of Energy ("DOE") of those assignments outside of this litigation, as required by the Standard Contract. Nevertheless, we have never affirmatively challenged those assignments in these cases. The claims that the plaintiffs have asserted before this Court, which relate to or arise from ownership interests or the sale of ownership interests in PSEG Nuclear's nuclear reactors, were all purportedly assigned to PSEG Nuclear. Those claims involve allegations that PSEG Nuclear was the beneficiary of a reduction in the purchase price for the plaintiffs' interests in the PSEG Nuclear reactors, and any such claims would be offset by the benefits that PSEG Nuclear obtained through such a price reduction. Accordingly, the Government is exercising its sole discretion to accept the assignments of those claims that the plaintiffs purported to make to PSEG Nuclear, to the extent

that we have been made aware of those claims through the plaintiffs' complaint in this action and through the assignment provisions in the purchase and sale agreements that have been included in the appendices to some of the briefing in this case.

With this clarification, and for the reasons set forth in the Government's prior briefing, we respectfully request that the Court dismiss the plaintiffs' claims here.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

JEANNE E. DAVIDSON
Director

FILED
MAR 2 3 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-790

In the Supreme Court of the United States

DELMARVA POWER & LIGHT COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States may waive the prohibition against the assignment of claims against the United States contained in the Assignment of Claims Act, 31 U.S.C. 3727, when the claim at issue is a takings claim.

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In the Supreme Court of the United States

No. 08-790

DELMARVA POWER & LIGHT COMPANY, ET AL.,
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v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 542 F.3d 889. The opinion of the Court of Federal Claims (Pet. App. 11a-40a) is reported at 79 Fed. Cl. 205.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2008. The petition for a writ of certiorari was filed on December 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Two statutes, 41 U.S.C. 15 and 31 U.S.C. 3727 (collectively, the Anti-Assignment Act), generally "preclude * * * the voluntary assignment of legal rights as

against the Government to third parties." Pet. App. 33a. The Assignment of Contracts Act provides that "[n]o contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned." 41 U.S.C. 15(a). The Assignment of Claims Act, the statute directly at issue in this case, generally prohibits the assignment of "a claim against the United States" unless certain conditions are met. 31 U.S.C. 3727(a)(1). "An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." 31 U.S.C. 3727(b). The statute also lists a number of procedural steps that must be followed before the assignment will be valid. *Ibid.*[1]

As this Court has recognized, the statutes described above were enacted "for the protection of the Government." *United States* v. *Aetna Cas. & Sur. Co.*, 338 U.S. 366, 371 (1949). Accordingly, courts have long held that the government may waive the protections of the Anti-Assignment Act and accept the assignment of a contract or claim. See, *e.g.*, *Cadwalder* v. *United States*, 45 F.3d 297, 299 (9th Cir. 1995); *Tuftco Corp.* v. *United States*, 614 F.2d 740, 746 (Ct. Cl. 1980); *United Pac. Ins. Co.* v. *United States*, 358 F.2d 966, 970 (Ct. Cl. 1966); *American Nat'l Bank & Trust Co.* v. *United States*, 23 Cl. Ct. 542, 546 (1991); *Maffia* v. *United States*, 163 F. Supp. 859, 862 (Ct. Cl. 1958).

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[1] Both the Assignment of Contracts Act and the Assignment of Claims Act have limited exceptions for assignments to financial institutions. 31 U.S.C. 3727(c); 41 U.S.C. 15(b). Those exceptions are not at issue in this case.

2. In the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10101 *et seq.*, Congress directed the Department of Energy (DOE) to provide a solution for the permanent storage and disposal of spent nuclear fuel. 42 U.S.C. 10131-10134. Congress authorized DOE to enter into contracts with the owners and generators of commercially-generated domestic nuclear power through which DOE would dispose of their spent nuclear fuel. 42 U.S.C. 10222(a). Through notice-and-comment rulemaking, DOE developed a standard contract that would be used to furnish disposal services to generators of spent nuclear fuel. 48 Fed. Reg. 16,590 (1983) (codified at 10 C.F.R. 961.11). The standard contract stated that the "services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998." 48 Fed. Reg. at 16,600; see 42 U.S.C. 10222(a)(5)(B).

In 1983, DOE entered into such contracts with numerous utilities, including PSEG Nuclear, LLC and Public Service Gas and Electric Co. (collectively, PSEG) and a predecessor of Exelon Generation Company (Exelon). Pet. App. 13a-14a & n.2. DOE was not able to begin accepting spent nuclear fuel by January 31, 1998, as required by the contracts. *Id.* at 2a. Both PSEG and Exelon filed lawsuits in the Court of Federal Claims (CFC) seeking damages for breach of contract, including the costs of continued on-site storage of their spent nuclear fuel. The United States has settled Exelon's lawsuit, but PSEG's lawsuit remains pending before the CFC. See *PSEG Nuclear, LLC* v. *United States*, No. 01-551C (filed Sept. 26, 2001).

3. Petitioners owned minority interests in some of Exelon's and PSEG's nuclear power reactors. Pet. App.

3a. Petitioners were not signatories to the disposal contracts. *Id.* at 11a-12a.

In 1999, petitioners executed written purchase and sale agreements through which they conveyed their minority interests to PSEG and Exelon. Pet. App. 3a, 13a-14a. In those agreements, petitioners purported to assign all of their claims against DOE to PSEG and Exelon. *Ibid.* In particular, Section 2.1 of the agreements listed as part of the "Purchase Assets":

> *All claims* of Seller relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract (*including all claims for failure by the Department of Energy to take Spent Nuclear Fuel*) accrued prior to, on or after the Closing Date, whether relating to periods prior to, on or after the Closing Date, and *all other claims* of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets, other than [specified excluded claims].

Id. at 4a-5a (quoting agreements; emphasis added). That provision was followed by a list of 13 separate "Excluded Assets." *Id.* at 5a.

4. Four years later, petitioners filed suit against the United States in the CFC, seeking to recover damages for breach of the spent nuclear fuel disposal contract and for an alleged taking under the Fifth Amendment to the United States Constitution. Pet. App. 3a. Petitioners alleged that they had obtained a reduced purchase price for their minority interests because DOE's breach of contract had lowered the value of the nuclear plants,

and that the reduction in the purchase price constituted a taking. *Ibid.*[2]

When PSEG became aware of petitioners' claims, it invoked the arbitration clause in the purchase and sale agreements. Pet. App. 3a. In arbitration, PSEG argued that petitioners had assigned them all claims, including takings claims, against DOE arising from the disposal contracts. *Ibid.* The arbitrators agreed with PSEG. *Id.* at 4a. The government was not a party to the arbitration proceedings. *Id.* at 3a-4a.

Petitioners challenged the arbitration award in state court in New Jersey, and the court upheld the award. Pet. App. 4a. Petitioners then moved to vacate the arbitration award in the CFC in this lawsuit. *Ibid.* PSEG intervened in this case for the limited purpose of defending the arbitration award and assignment of claims. *Id.* at 21a.

Recognizing that the Assignment of Claims Act, 31 U.S.C. 3727, normally would prohibit the assignment of petitioners' claims, the CFC asked the government whether it wished to waive its rights under the Act and accept the assignment. Pet. App. 4a. The government filed a written notice stating that it had elected to accept the assignment. *Ibid.* That notice provided:

> [T]he Government is exercising its sole discretion to accept the assignments of those claims that the plaintiffs purported to make to PSEG Nuclear, to the extent that we have been made aware of those claims through the plaintiffs' complaint in this action and through the assignment provisions in the purchase

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[2] Petitioners value their takings claim at "$80 to $100 million." Pet. 3. There is no record support for that assertion.

> and sale agreements that have been included in the appendices to some of the briefing in this case.

Id. at 53a-54a.

The government then moved for summary judgment, arguing that petitioners had no cognizable claims because they had assigned all of their claims to PSEG in the purchase and sale agreements, and the government had accepted that assignment. Pet. App. 15a-16a, 29a-30a. The government also argued that petitioners' takings claims failed as a matter of law because they were premised on a breach of contract. *Id.* at 16a, 30a.

5. The CFC denied petitioners' motion to vacate the arbitration award and granted the government's summary judgment motion. Pet. App. 11a-40a. The CFC held that petitioners were not entitled to any relief because they had assigned to PSEG all of their claims, including their takings claims, and the government had validly accepted that assignment. *Id.* at 29a-40a. The court rejected petitioners' arguments that their written assignments were rendered void by the Assignment of Claims Act, 31 U.S.C. 3727. Pet. App. 35a-36a. The court recognized that the Act bars private parties from assigning their claims against the government except under certain specified conditions. *Id.* at 32a-33a. The court explained, however, that the government may waive the Act's protections because "[t]he Assignment of Claims Act operates for the benefit of the Government" and is "intended to protect the Government from voluntary assignments of contracts or claims to parties where it has not consented to or recognized the assignment." *Id.* at 34a-36a (citing *Aetna Cas. & Sur. Co.*, *supra*). Because the government had expressly accepted petitioners' assignment of its claims to PSEG in this

case, the court explained, "all assignments of such contracts and claims * * * are valid." *Id.* at 36a-37a.

The CFC further held that petitioners' takings claims were encompassed within the assignment clause in the purchase and sale agreements. Pet. App. 37a-39a. The court explained that the "plain language of the written agreement" (*id.* at 39a) makes clear that petitioners transferred to PSEG all claims against DOE, including any takings claims:

> Section 2.1(*l*) of the [purchase and sale agreements] transferred to buyers not only "[a]ll claims of Seller relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract," but also "*all other claims* of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets . . ." The [spent nuclear fuel] was one of these Purchased Assets, and [petitioners'] takings claims, whatever their merits, are "claims of the Seller against the Department of Energy with respect to, arising out of, or in connection with" that [spent nuclear fuel].

Ibid. (citations omitted).[3] Because petitioners had assigned all of their claims to PSEG, and the government had accepted that assignment, the court granted summary judgment for the government. *Id.* at 40a.

6. The court of appeals affirmed. Pet. App. 1a-10a. The court held that "[t]he language of the assignment clause of the Transfer Agreements on its face covers the taking claims" because it includes among the purchased

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[3] The court noted that petitioners had not challenged the government's authority to waive the protections of the Assignment of Claims Act with respect to their breach of contract claims. Pet. App. 38a n.11.

assets "'[a]ll claims of the Seller relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract'"—"'including all claims for failure by the Department of Energy to take Spent Nuclear Fuel'"—and "'all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets.'" *Id.* at 4a-5a (quoting agreements). The court noted that petitioners did not contest that understanding of the assignment clause. *Id.* at 4a.

The court of appeals rejected petitioners' argument that they could void their own claims assignments when the government was willing to accept the assignments. Pet. App. 5a-8a. The court explained that, although the Assignment of Claims Act would normally prohibit an assignment such as the one at issue here, *id.* at 5a-6a, it has long been recognized that the Act was enacted "for the protection of the Government," *id.* at 8a (quoting *Aetna Cas. & Sur. Co.*, 338 U.S. at 371), and that "the Government, if it chooses to do so, may recognize an assignment," *id.* at 7a-8a (quoting *Tuftco Corp.*, 614 F.2d at 745). Here, the court explained, the government had expressly accepted petitioners' assignment of their claims, and the government's "recognition and acceptance of such an assignment makes it a valid assignment." *Id.* at 9a.

For purposes of the waiver analysis, the court of appeals found no reason to distinguish between the Assignment of Claims Act and the Assignment of Contracts Act. Pet. App. 8a-9a. Although the two statutes "deal with different aspects of relationships and dealings with the government," the court explained, "they serve the common goal of protecting the government from similar problems that may arise from those relationships." *Id.*

at 8a. Thus, with respect to both assignment of contracts and assignment of claims, if "the government concludes that it is appropriate and in its best interest to accept the assignment, it may do so." *Id.* at 9a.

ARGUMENT

Petitioners conceded below that the plain language of the assignment clause at issue here includes takings claims, see Pet. App. 4a-5a, 39a, and that the government generally has the authority to waive the protections of the Assignment of Claims Act, see *id.* at 38a n.11. Petitioners contend, however, that the government's general authority to accept assignments of claims does not encompass takings claims. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals. Moreover, this case would present a poor vehicle to consider the question presented because petitioners' takings claims fail as a matter of law. Further review is not warranted.

1. The court of appeals correctly held that the government may waive the protections of the Assignment of Claims Act and accept the assignment of petitioners' takings claims. As the court recognized (Pet. App. 5a-6a), the Assignment of Contracts Act and the Assignment of Claims Act "broadly prohibit * * * transfer of contracts involving the United States or interests therein, and assignment of claims against the United States," except under the particular conditions identified in those statutes. *Fireman's Fund Ins. Co.* v. *England*, 313 F.3d 1344, 1349 (Fed. Cir. 2002). To the extent that the conditions in the statutes are satisfied, the government is required to recognize the assignments. Absent satisfaction of those statutory conditions, however, no private

entity can enforce a voluntary contract or claim assignment against the government. *United States* v. *Shannon*, 342 U.S. 288, 291-293 (1952).

Nonetheless, the government may waive the protections of both the Assignment of Claims Act and the Assignment of Contracts Act. As this Court has long recognized, those statutes were enacted for the sole benefit and protection of the government. *Shannon*, 342 U.S. at 291-292; *Aetna Cas. & Sur. Co.*, 338 U.S. at 371-373; *McKenzie* v. *Irving Trust Co.*, 323 U.S. 365, 369 (1945); *Martin* v. *National Sur. Co.*, 300 U.S. 588, 594 (1937); *McGowan* v. *Parish*, 237 U.S. 285, 294 (1915); *Hobbs* v. *McLean*, 117 U.S. 567, 576 (1886); *Goodman* v. *Niblack*, 102 U.S. 556, 560 (1881).[4] It is therefore the government, and only the government, that can invoke their protections. See *Martin*, 300 U.S. at 594-596; see also *Cessna Aircraft Co.* v. *Dalton*, 126 F.3d 1442, 1451-1452 (Fed. Cir. 1997) ("[I]f the primary intended beneficiary of a statute or regulation is the government, then a private party cannot complain about the government's failure to comply with that statute or regulation, even if that party derives some incidental benefit from compliance with it."), cert. denied, 525 U.S. 818 (1998); *United States* v. *Certain Space in the Prop. Known as the Chimes Bldg.*, 320 F. Supp. 491, 496 (N.D.N.Y. 1969)

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[4] In particular, the statutes were designed "to prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government"; "to prevent possible multiple payments of claims, to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant"; and "to save to the United States defenses which it has to claims by an assignor by way of set-off, counter claim, etc., which might not be applicable to an assignee." *Shannon*, 342 U.S. at 291-292 (internal quotation marks and citations omitted).

("The Anti-Assignment Act is for the government's protection and only the United States may assert it."), aff'd, 435 F.2d 872 (2d Cir. 1970) (per curiam), cert. denied, 402 U.S. 908 (1971).

The lower courts have consistently held that, notwithstanding the prohibitions of the Anti-Assignment Act, the government can accept an assignment that it deems to be in its own best interests. *Cadwalder*, 45 F.3d at 299; *Tuftco Corp.*, 614 F.2d at 745; *Vermont Yankee Nuclear Power Corp.* v. *United States*, 73 Fed. Cl. 236, 241 (2006); *Riviera Fin. of Tex., Inc.* v. *United States*, 58 Fed. Cl. 528, 530 (2003); *American Nat'l Bank & Trust Co.*, 23 Cl. Ct. at 546 (1991); *Maffia*, 163 F. Supp. at 862. This Court has also repeatedly suggested that the government may waive the protections of the Anti-Assignment Act. See *McGowan* v. *Parish*, 237 U.S. 285, 294 (1915) ("It has several times been declared by this [C]ourt that the statute was intended solely for the protection of the government and its officers during the adjustment of claims, and that, after allowance, the protection may be invoked or waived, as they in their judgment deem proper."); see also *Aetna Cas. & Sur. Co.*, 338 U.S. at 373 ("The rigor of this rule [prohibiting assignments under the Assignment of Claims Act] was very early relaxed in cases which were thought not to be productive of the evils which the statute was designed to obviate.").

Because the government may waive the protections of the Anti-Assignment Act, and it unambiguously did so here, all of petitioners' claims were assigned to PSEG. The court of appeals therefore correctly determined that the government was entitled to summary judgment.

2. Petitioners contend (Pet. 12-20) that the government cannot waive the protections of the Assignment of Claims Act at all. Petitioners waived that argument below, however, by conceding that the government may accept the assignments of their *breach of contract* claims. See Pet. App. 38a n.11; C.A. App. 732, 734-735 n.4. In any event, no court has held that the government may not waive the protections of the Assignment of Claims Act, and several federal courts have long held to the contrary.

Petitioners rely on several cases that state the general rule that the Assignment of Claims Act prohibits private parties from assigning claims against the government. Pet. 13-14 & n.10 (citing *National Bank of Commerce* v. *Downie*, 218 U.S. 345 (1910), *Nutt* v. *Knut*, 200 U.S. 12 (1906), *Spofford* v. *Kirk*, 97 U.S. 484 (1878), and *United States* v. *Gillis*, 95 U.S. 407 (1877)). None of those decisions, however, addresses the question whether the government may waive the protections of the Assignment of Claims Act. See Pet. App. 9a (explaining that none of petitioners' cited cases "involved any question of, or decided whether the government could recognize as valid, an assignment of claims that would otherwise violate the statute").

Petitioners' reliance (Pet. 12) on *McKnight* v. *United States*, 98 U.S. 179 (1879), is likewise misplaced. The Court in *McKnight* did not address the question whether the government may waive the protections of the Assignment of Claims Act and accept assignment of a claim. Rather, the Court held that the government's payment of part of an assigned claim did not waive the government's right to object to the remainder of the assignment because the assignment "conferred no right that the United States was bound to regard." *Id.* at 186.

The Court further held that the circumstances did not show that the government had intended to accept the entirety of the claim, noting in particularly that "[t]here could have been no consideration for" such a waiver. *Ibid.*

Here, by contrast, the CFC found that the government had accepted the assignment, Pet. App. 36a-37a, and petitioners have not challenged that finding. The government obtained a direct benefit from acceptance of the assignment—the ability to litigate damages from the government's breach of contract in a single case. *McKnight* does not suggest that the government may never accept an assignment of a claim. To the contrary, the Court noted that, although the government was not required to do so, it had permissibly accepted the assignment of part of the claim in that case. 98 U.S. at 185-186.

The court of appeals correctly rejected petitioners' argument that the government's ability to accept an assignment differs in the contexts of the Assignment of Contracts Act and Assignment of Claims Act. As the court explained, "[a]lthough the two provisions deal with different aspects of relationships and dealings with the government, they serve the common goal of protecting the government from similar problems that may arise from those relationships." Pet. App. 8a. Consistent with that reasoning, the lower courts have long held that the government may waive the protections of either statute. See, *e.g.*, *Tuftco Corp.*, 614 F.2d at 744-745 & n.4 (explaining that, on the question of waiver, "the concerns of the two statutes and the legal concepts involved in their applicability are the same").

To the extent this Court has spoken on the question presented, it has rejected petitioners' argument. This

Court has repeatedly acknowledged that the Assignment of Claims Act was enacted for the protection of the government, see, *e.g.*, *Aetna Cas. & Sur. Co.*, 338 U.S. at 373 (citing cases), and it has suggested that the government may waive the protections of the Act when doing so is in the government's best interests, see *id.* at 373-374; *McGowan*, 237 U.S. at 294; *McKnight*, 98 U.S. at 185-186. Further, there is no disagreement in the lower courts on this point. The Federal Circuit and its predecessor court, the Court of Claims, have long held that the government may waive the protections of the Assignment of Claims Act. See, *e.g.*, *Tuftco Corp.*, 614 F.2d at 745; *Maffia*, 163 F. Supp. at 862. The only other court of appeals that has considered the issue has agreed. See *Cadwalder*, 45 F.3d at 299.

3. Petitioners contend (Pet. 10-11) that the government's authority to waive the protections of the Assignment of Claims Act does not include takings claims. That argument lacks merit. The court of appeals determined, and petitioners did not contest, that their takings claims are encompassed within the plain language of the assignment clause in their agreements with PSEG. Pet. App. 4a-5a, 39a. And nothing in the language or purposes of the Assignment of Claims Act distinguishes takings claims from any other types of claims. To the contrary, the Act is broadly intended to protect the government in its dealings with parties, and a rule barring the government from waiving the prohibition against assignments of any particular claim—including a takings claim—would disserve that underlying purpose. See

Aetna Cas. & Sur. Co., 338 U.S. at 373; *NRG Co.* v. *United States*, 31 Fed. Cl. 659, 661-664 (1994).[5]

Contrary to petitioners' contention (Pet. 10-11), the ruling below does not conflict with this Court's decision in *United States* v. *Dow*, 357 U.S. 17 (1958). The Court in *Dow* did not address the question whether the government may accept an assignment of a takings claim. Instead, the Court addressed the distinct issue of when a takings claim had vested—whether in that case "the claim to 'just compensation' vested in the owners of the land at the time the United States entered into possession of the easement * * * in 1943 or whether such claim vested * * * at the time the United States filed a declaration of taking in 1946." *Id.* at 18. The Court held that the takings claim had vested in 1943 when the government "entered and appropriated the property to public use." *Id.* at 23. As a result, the Court explained, Dow could not bring a takings claim, because he had purchased the property in 1945, after the takings claim had vested. *Id.* at 21.

Dow attempted to avoid that result by arguing that the prior owners had assigned their takings claim to him. *Dow*, 357 U.S. at 20. The Court rejected that contention, explaining that "the Assignment of Claims Act prohibits the voluntary assignment of a compensation claim against the Government for the taking of property." *Ibid.* The Court had no occasion to decide, however, whether the government may waive its rights under the Assignment of Claims Act, see Pet. App. 35a n.8, nor did it suggest that the Assignment of Claims Act

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[5] As the decision in *NRG Co.* makes clear, petitioners are mistaken in contending (Pet. 3) that the United States has never accepted the assignment of a takings claim.

distinguishes between a takings claim and any other type of claim.

4. Even if the question presented warranted this Court's review, this would be an inappropriate case in which to address it, because petitioners' takings claim fails as a matter of law. Petitioners' takings claim is based on the government's contractual agreement to accept spent nuclear fuel, and their remedies therefore are limited exclusively to contract remedies.[6] It is well-settled that where a party's rights are created by contract with the government, a party cannot state a takings claim against the government founded upon a breach of that contract. See, *e.g.*, *Castle* v. *United States*, 301 F.3d 1328, 1342 (Fed. Cir. 2002), cert. denied, 539 U.S. 925 (2003); *Smith* v. *United States*, 58 Fed. Cl. 374, 388-389 (2003), aff'd, 110 Fed. Appx. 898 (Fed. Cir. 2004) (per curiam), cert. denied, 544 U.S. 1033 (2005). When a party enters into a contract, that party has either the right to receive performance or, if a breach occurs, the right to receive damages pursuant to contract law. See *Plaintiffs in Winstar-Related Cases* v. *United States*, 37 Fed. Cl. 174, 187 n.9 (1997), aff'd *sub nom. Ariadne Fin. Servs. Pty. Ltd.* v. *United States*, 133 F.3d 874 (Fed. Cir.), cert. denied, 525 U.S. 823 (1998); see also *Northwest Airlines, Inc.* v. *United*

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[6] Any right petitioners had to acceptance of their spent nuclear fuel was pursuant to the disposal contract, rather than to the NWPA itself. The NWPA does not require DOE to accept spent nuclear fuel from any entity. Rather, it authorizes the Secretary of Energy "to enter into contracts with any person who generates or holds title" to spent nuclear fuel "for the acceptance of title, subsequent transportation, and disposal of such waste." 42 U.S.C. 10222(a)(1). Absent such contracts, DOE had no obligation to accept spent nuclear fuel from any particular entity.

States Dep't of Transp., 15 F.3d 1112, 1120 n.5 (D.C. Cir. 1994).

Unless the government deprives the contracting party of its contract remedies, the government does not effect a taking. See *Castle*, 301 F.3d at 1342; *Bailey* v. *United States*, 53 Fed. Cl. 251, 256-257 (2002), aff'd, 341 F.3d 1342 (Fed. Cir. 2003), cert. denied, 541 U.S. 1072 (2004). Courts have repeatedly applied that principle in the context of government contracts for the disposal for spent nuclear fuel, holding that claims for damages based on the government's breach of contract must be litigated as contract claims, not as takings claims. See *System Fuels, Inc.* v. *United States*, 78 Fed. Cl. 769, 809 (2007); *Northern States Power Co.* v. *United States*, 78 Fed. Cl. 449, 472 (2007); *Pacific Gas & Elec. Co.* v. *United States*, 70 Fed. Cl. 766, 777-779 (2006); *Canal Elec. Co.* v. *United States*, 65 Fed. Cl. 650, 656 (2005). Just as in those cases, petitioners' only possible right to recover from the government arose from the disposal contract, and they have not alleged that the government has taken any contractual remedies that would otherwise be available to them.

5. Contrary to petitioners' contention (Pet. 3), the government has not argued that its acceptance of an assignment of a takings claim automatically extinguishes the claim. The court of appeals did not suggest that petitioners' takings claims had been extinguished, but rather held that the claims had been assigned to another party (PSEG). As a result of that assignment, PSEG may now assert all claims, including takings claims, that previously belonged to petitioners.

The government has contended that, if PSEG pursues petitioners' takings claim, then any money awarded for that claim should be offset against PSEG's award for

breach of contract. See Pet. App. 53a. In the government's view, such an offset would be appropriate because petitioners' takings theory is that PSEG paid a reduced price for petitioners' interests in order to compensate itself for the future costs that it expected to incur to store spent nuclear fuel because of DOE's breach of contract. But in any event, the propriety of any such offset is a matter to be litigated between the government and PSEG. It is of no concern to petitioners, who assigned their takings claims pursuant to a written agreement under which they received compensation. See, *e.g.*, *Dow*, 357 U.S. at 27.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

DELMARVA POWER & LIGHT COMPANY AND
ATLANTIC CITY ELECTRIC COMPANY,
Petitioners,

v.

UNITED STATES AND
PSEG NUCLEAR, LLC AND
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR PSEG NUCLEAR, LLC AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the Assignment of Claims Act is intended to protect the interests of the Respondent the United States ("the Government"), may the Government waive the requirements of that Act and accept an assignment of claims that a duly-constituted arbitration panel determined had been transferred to Respondent PSEG Nuclear, LLC ("PSEG") in connection with PSEG's purchase of Petitioners' interests in the nuclear plants?

2. Given the Government's written consent to the assignment of Petitioners' takings claims and its knowing waiver of the requirements of the Assignment of Claims Act, were the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit, the arbitration panel, and the New Jersey state courts correct in recognizing the assignment as valid, where the Purchase Agreements transferred any takings claims to PSEG and gave PSEG complete control over any litigation regarding those claims, where Petitioners failed to notify PSEG that any takings claims existed as required by the Purchase Agreements, and where PSEG itself has pleaded a takings claim against the Government, thereby leaving PSEG as the sole claimant against the Government?

CORPORATE DISCLOSURE STATEMENT

PSEG Nuclear, LLC is a wholly-owned subsidiary of PSEG Power, LLC. PSEG Power, LLC is a wholly-owned subsidiary of Public Service Enterprise Group, Incorporated, a publicly-traded holding company. Public Service Electric and Gas Company is the predecessor in interest to PSEG Nuclear, LLC; Public Service Electric and Gas Company has issued no shares to the public and is a wholly-owned subsidiary of Public Service Enterprise Group, Incorporated, a publicly-traded holding company.

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IN THE

Supreme Court of the United States

No. 08-790

DELMARVA POWER & LIGHT COMPANY AND
ATLANTIC CITY ELECTRIC COMPANY,
Petitioners,

v.

UNITED STATES AND
PSEG NUCLEAR, LLC AND
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR PSEG NUCLEAR, LLC AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions set forth in Petitioners' appendix ("Cert App."), Respondents PSEG Nuclear, LLC and Public Service Electric and Gas Company (together "PSEG") submit the pertinent provisions of Article III and Article IV, Section 1 of

the U.S. Constitution, 28 U.S.C. § 1738 (2006), and the Federal Arbitration Act, 9 U.S.C. §§ 9, 10, & 13 (2006) in the attached Appendix at 73a-78a ("PSEG App.").

STATEMENT OF THE CASE

PSEG built, and since their completion, has operated the Hope Creek and Salem nuclear generating plants. Initially, PSEG owned 95% of the Hope Creek unit, with Petitioner Atlantic City Electric Company ("ACE") owning the remaining 5%. With respect to the Salem facility, PSEG initially owned 42.59%, Philadelphia Electric Company[1] owned 42.59%, and ACE and Petitioner Delmarva Power & Light Company ("Delmarva") each owned 7.41%. *See generally In re Atlantic City Elec. Co.*, 90 F.E.R.C. ¶ 61,268, at 61,897-98 (2000) (discussing ownership percentages of ACE, Delmarva, and PSEG before and after sale).

In 1983, as required by the Nuclear Waste Policy Act, 42 U.S.C. § 10222 (2006), PSEG entered into contracts on its behalf and on behalf of its co-owners with the U.S. Department of Energy ("DOE") for the disposal of the spent nuclear fuel generated by Hope Creek and Salem. PSEG App. at 59a-60a. As a result of the DOE's breach of its obligation to begin accepting spent nuclear fuel by 1998, all nuclear utilities filed breach of contract lawsuits in the U.S. Court of Federal Claims ("CFC") against the United States. PSEG filed its lawsuit in 2001. The Petitioners filed their lawsuits in 2004. The Petitioners' lawsuits initially alleged that the Government's failure to perform caused a Fifth Amendment taking, but they later added "protective" claims for breach of con-

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[1] Philadelphia Electric Company is now known as PECO Energy Company and is a subsidiary of Exelon Corporation.

tract. *See Delmarva Power & Light Co. v. United States*, 79 Fed. Cl. 205, 207 (2007) ("*Delmarva I*"), Cert App. at 15a-16a.

Petitioners' brought their lawsuits five years after they sold their small, minority interests in the Hope Creek and Salem facilities to PSEG for $30 million. *See Delmarva Power & Light Co. v. United States*, 542 F.3d 889, 891 (Fed. Cir. 2008) ("*Delmarva II*"), Cert App. at 3a. The 1999 sale was made "to comply with state and federal regulatory policies," Cert Pet. at 6. The sale was reviewed and approved by the New Jersey Board of Public Utilities, which concluded that ACE and Delmarva received fair market value for the sale of their interests, the position put forward by ACE and Delmarva before that regulatory agency. *See In re Atlantic City Elec. Co.*, No. EM 99110870, 2000 WL 1273700, at *11-14 (N.J.B.P.U. July 21, 2000).[2]

The purchase agreements between PSEG and Petitioners for the sale of Petitioners' minority interests in the Salem and Hope Creek plants ("Purchase Agreements") set out in great detail the rights that

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[2] The Board of Public Utilities' decision directly contradicts the claim in the National Association of Regulatory Utility Commissioners' ("NARUC") brief Amicus Curiae that ACE and Delmarva did not receive fair market value for their small shares of the Hope Creek and Salem stations. *See* NARUC Brief at 3-5; *In re Atlantic City Elec. Co.*, 2000 WL 1273700, at *14 ("Based on the foregoing factors, the Board concludes that the sale of the Company's interest in its nuclear generating assets to PSEG Power and PECO reflects the full market value of the assets."). NARUC's support for its claim was the assertion by the New Jersey Ratepayer Advocate which the Board of Public Utilities did not adopt. *See* NARUC Brief at 4 n.7; *In re Atlantic City Elec. Co.*, 2000 WL 1273700, at *12-13. Notably, Petitioners did not make the claim advanced by NARUC.

PSEG purchased for value, as well as the rights retained by ACE and Delmarva. The Purchase Agreements provided that PSEG "shall have all rights of recovery from third parties and the Department of Energy relating to, arising from or in connection with the Department of Energy's failure to take Spent Nuclear Fuel." Purchase Agreements § 2.6, PSEG App. at 70a.[3] The Purchase Agreements expansively defined the assets that PSEG was purchasing. Purchase Agreements § 2.1, PSEG App. at 61a-63a. Among the purchased assets were ACE and Delmarva's claims against the Government relating to the Government's failure to remove spent nuclear fuel:

> All claims of Seller [Delmarva or ACE] relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract (including all claims for failure by the Department of Energy to take Spent Nuclear Fuel) accrued prior to, on or after the Closing Date, whether relating to periods prior to, on or after the Closing Date, and all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets . . . .

Purchase Agreements § 2.1(l), PSEG App. at 63a; *Delmarva II*, 542 F.3d at 892, Cert App. at 4a-5a. More broadly, the Purchase Agreements assigned all of ACE and Delmarva's claims against any third-parties to PSEG and recognized this assignment as part of PSEG's purchased assets:

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[3] For ease of reference, PSEG includes excerpts of only one of the Purchase Agreements in the appendix because of the materially identical terms of the Agreements as pertinent to this case.

> The rights of Seller [Delmarva or ACE] in, to and under all causes of action against third parties with respect to, arising out of or in connection with Seller's rights, title and interests in and to the Purchased Assets or the Assumed Liabilities, or any portion thereof, whether accruing prior to, on or after the Closing Date . . . .

Purchase Agreements § 2.1(m), PSEG App. at 63a. Significantly, ACE and Delmarva also agreed that PSEG "shall be entitled exclusively to control, defend and settle any suit, action or proceeding, and any investigation arising out of or related to any Purchased Assets or Assumed Liabilities . . . ." *Id.* § 2.5(b), PSEG App. at 69a.

In addition to the $30 million purchase price, PSEG assumed a long list of Petitioners' liabilities as part of the consideration for PSEG's purchase, including "all on-site environmental liabilities" and "all decommissioning liabilities associated with the Nuclear assets." *See, e.g., In re Atlantic City Elec. Co*, 2000 WL 1273700, at *9. ACE and Delmarva did not have to provide any funds toward the decommissioning trust fund as would normally be the case in the sale of nuclear assets. *See, e.g., id.* PSEG assumed "[a]ll liabilities and obligations of [ACE and Delmarva] in respect of Spent Nuclear Fuel" with only a single exception not relevant to this case. Purchase Agreements § 2.3(f), PSEG App. at 68a.

The Purchase Agreements specifically defined the assets that were excluded from the sale in fourteen specific asset categories. *Id.* § 2.2, PSEG App. at 64a-68a. ACE and Delmarva point to no provision that even suggests that the takings claims that ACE and

Delmarva assert that they retained were among the assets that ACE and Delmarva did not sell to PSEG.[4]

Additionally, the Purchase Agreements required Delmarva and ACE to disclose to PSEG any eminent domain or takings claims that existed prior to closing the sale of their interests. *Id.* § 6.8, PSEG App. at 70a-71a.

> [I]f before the Closing Date, all or any portion of the Purchased Assets is . . . condemned or taken by eminent domain or is the subject of a pending or threatened condemnation or taking which has not been consummated . . . Seller shall notify Buyer promptly in writing of such fact, and . . . in the case of a condemnation or taking, Seller shall assign or pay, as the case may be, any proceeds thereof to Buyer at the Closing . . . .

Id., PSEG App. at 70a. ACE and Delmarva never notified PSEG of any pending or threatened taking by the Government prior to the closing of the sale of their Hope Creek and Salem minority shares to PSEG.

One of the most material events impacting this case—and one that is nowhere to be found in the Petition—is the parties' arbitration as to the assignment of Petitioners' takings claims. In view of lawsuits that Petitioners filed notwithstanding the provisions of the Purchase Agreements, in January 2007 PSEG invoked the Purchase Agreements' arbitration provision based on Petitioners' assignment of

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[4] The Excluded Assets explicitly identified other litigation claims that ACE and Delmarva retained. Purchase Agreements § 2.2(l), PSEG App. at 66a-67a (claims relating to the DOE Decommissioning and Decontamination fees); *id.* § 2.2(m), PSEG App. at 67a (pending action against Westinghouse Electric Corporation).

their takings claims against the United States to PSEG. *See Delmarva I*, 79 Fed. Cl. at 208-09, Cert App. 17a-18a.[5] Shortly thereafter, Delmarva and ACE filed their own arbitration demand pursuant to the Purchase Agreements, asserting that no such assignments had been made. The CFC stayed ACE and Delmarva's cases pending the resolution of the arbitration. Thereafter, Delmarva, ACE, and PSEG entered binding arbitration to determine whether Petitioners had assigned their takings claims against the Government to PSEG.

On June 20, 2007, a three-person arbitration panel that included retired-Judge Michael Mukasey (and later Attorney General of the United States) issued a decision concluding that "ACE/Delmarva assigned the takings claims at issue here to PSEG, and that ACE/Delmarva's initiation of its takings litigation and its refusal to dismiss the litigation breached the [Purchase Agreements]." PSEG App. at 24a. Looking at the language in the Purchase Agreements (quoted above, in pertinent part), the arbitration panel ruled:

> These broad assignments make no exceptions for particular kinds of claims, and the detailed Excluded Assets list in the [Purchase Agreements] make no mention of any takings claims. . . . It is hard to imagine a more comprehensive assignment of claims. On their face, the [Purchase Agreements] leave no doubt that the takings claims at issue here were assigned to PSEG and

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[5] The Purchase Agreements' arbitration mechanism provides "the sole remedy available to either Party" in the event of a dispute "'relating to or arising out of any provisions of'" the Purchase Agreements. Purchase Agreements § 8.3(a), PSEG App. at 71a-72a.

> that PSEG received the exclusive right to control the litigation over the claims.
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> * * * *
>
> The Purchased Assets explicitly include [spent nuclear fuel ("SNF")], and the takings claims indisputably arise out of or are in connection with [the Department of Energy's] failure to take SNF. Accordingly, it is irrelevant whether the takings claims arise from the Standard Contract or from some other source—in either case, they are covered by the [Purchase Agreements'] assignment clauses.

Id. at 18a-19a.

On June 22, 2007, PSEG filed a complaint in the Superior Court of New Jersey ("Superior Court") to confirm the arbitration award. *Delmarva I*, 79 Fed. Cl. at 210, Cert App. at 20a. As PSEG pursued confirmation of the arbitration award in the Superior Court, ACE and Delmarva moved to vacate the arbitration ruling before the CFC, which denied the motion for lack of jurisdiction. *Delmarva I*, 79 Fed. Cl. at 210, 213, Cert App. at 20a, 29a ("[T]his court does not possess the power to disturb an arbitration created by an agreement between private parties and involving those private parties. For this reason, plaintiffs' motion to vacate the arbitration ruling is denied."). In the course of the CFC's proceedings on ACE and Delmarva's motion to vacate the arbitration decision, the Government accepted Delmarva and ACE's assignment of their takings claims to PSEG. Cert App. at 51a-54a.

On December 19, 2007, the Superior Court confirmed the arbitration award to PSEG over Delmarva and ACE's objections. The New Jersey court ruled

that whether the arbitration panel's ruling "will relieve the United States from its obligation to pay just compensation for its taking is irrelevant towards determining the scope of the arbitration clause in the [Purchase] Agreements." PSEG App. at 48a. The New Jersey court further noted:

> The arbitration panel's function was not to determine the ultimate result from the assignment of [Delmarva and ACE's] takings claims, but whether [Delmarva and ACE's] takings claims were in fact transferred to [PSEG] as part of the Purchased Assets under the [Purchase] Agreements. Nor did the arbitration panel decide what would become of [Delmarva and ACE's] takings claims; rather it simply found that the Agreements' assignment language included [Delmarva and ACE's] takings claims and that the Assignment of Claims Act did not act as an absolute prohibition of [Delmarva and ACE's] assignment of their takings claims to Plaintiffs.

Id. The Superior Court confirmed the arbitration award. Delmarva and ACE appealed the decision confirming the award to the Superior Court of New Jersey—Appellate Division, but withdrew their appeal after the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") in *Delmarva II* affirmed the CFC's decision in *Delmarva I* regarding the Government's ability to waive the Assignment of Claims Act. The New Jersey appellate court then dismissed the appeal. PSEG App. at 58a.

REASONS FOR DENYING THE PETITION

The Federal Circuit's decision is correct—the Government may waive the requirements of the Assignment of Claims Act. Contrary to ACE and Del-

marva's contentions, the Federal Circuit decision is consistent with Supreme Court precedent, the Fifth Amendment, and the Assignment of Claims Act. The Federal Circuit properly applied the law to the facts of this unremarkable case. Even aside from the Assignment of Claims Act issue, the Federal Circuit also could have simply upheld the CFC's determination that it lacked jurisdiction to overturn the arbitration decision, which conclusively determined that ACE and Delmarva had no right to pursue their takings claims. Thus, ACE and Delmarva can receive no further relief rendering this appeal moot.

I. THIS COURT'S PRECEDENT ALLOWS THE GOVERNMENT TO WAIVE THE REQUIREMENTS OF THE ASSIGNMENT OF CLAIMS ACT

Contrary to Petitioners' attempt to turn the Government's Assignment of Claims Act shield into Petitioners' sword, the Federal Circuit properly concluded that the Government may recognize an assignment and waive the application of the Assignment of Claims Act. *See Delmarva II*, 542 F.3d at 893, Cert App. at 8a ("We see no valid reason why the government should not . . . be able to waive the Anti-Assignment Act's prohibition in section 3727(a) against the assignment of claims."). This Court has regularly noted that the Act's "sole purpose was to protect the government, and not the parties to the assignment." *Goodman v. Niblack*, 102 U.S. 556, 560 (1880); *see also Martin v. Nat'l Surety Co.*, 300 U.S. 588, 594 (1937) ("The provisions of the statute making void an assignment or power of attorney by a Government contractor are for the protection of the Government.").

This Court (and lower courts) have repeatedly stated that the Assignment of Claims Act protects the Government, among other ways, by assuring that the Government will not have to face multiple claimants. *See United States v. Dow*, 357 U.S. 17, 26 (1958) ("To require the Government to deal with more than one party, particularly when division of the condemnation award would entail a complex apportionment, might severely impede the orderly progress of condemnation proceedings and would conflict with the policies underlying the Anti-Assignment Act."); *Hobbs v. McLean*, 117 U.S. 567, 576 (1886) (stating that the Assignment of Claims Act, among other acts, was "passed in order that the government might not be harassed by multiplying the number of persons with whom it had to deal"); *Keydata Corp. v. United States*, 504 F.2d 1115, 1118 (Ct. Cl. 1974) ("'Over the years [the Assignment of Claims Act] has consistently been recognized by the courts to have two purposes—primarily, to prevent fraud; and secondarily, to avoid multiple litigation.'") (quoting *Patterson v. United States*, 354 F.2d 327, 329 (Ct. Cl. 1965)). ACE and Delmarva's lawsuit flies in the face of this fundamental purpose of the Act. They seek here to void an assignment and employ the Act to assure that the Government will face multiple litigants. ACE and Delmarva effectively request that this Court turn the Act upside down by requiring the Government to defend claims by multiple litigants—Delmarva, ACE, and PSEG—involving the same two power plants (Salem and Hope Creek). The lower courts' conclusions better comport with the purpose of the statute by allowing the Government to recognize the assign-

ment of the takings claims, thus leaving PSEG as the sole claimant.[6]

Because the Act is for the sole benefit of the Government and its purpose is to allow the Government to avoid facing multiple litigants, the Government may waive the Act's protection to face only one litigant. This Court has long held that the Government may recognize a claim, even where an assignment violates an explicit requirement of the Act. In *Bailey v. United States*, 109 U.S. 432, 435-436 (1883), an assignor that had executed a power of attorney attempted to recover an amount from the Government, which paid the assignee attorney-in fact. The assignment of claims in *Bailey* occurred prior to the Government allowing the claim and before a warrant issued for payment—both requirements of the Act that ACE and Delmarva incorrectly assert may never be waived.[7] *See id.* at 438-39 ("The question is whether payment to one who has been authorized to receive it, by the power of attorney executed *before the allowance of the claim by act of Congress*, was

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[6] In their Cert Petition at 16, ACE and Delmarva complain that the Federal Circuit relied on cases relating to the Assignment of Contracts Act, 41 U.S.C. § 15 (2006) and that the Federal Circuit mistakenly treated the Assignment of Contracts Act and the Assignment of Claims Act as being essentially interchangeable. However, this Court has similarly discussed both statutes interchangeably and recognized that the two statutes have the same goal of protecting the Government. *See Hobbs*, 117 U.S. at 574, 576 ("The sections under consideration [including the Assignment of Claims Act and the Assignment of Contracts Act] were passed for the protection of the government.").

[7] *See* 31 U.S.C. § 3727(b) (2006) ("An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued."), Cert. App. at 42a.

good as between the government and claimant, where, at the time of payment, such power of attorney was unrevoked.") (emphasis added); *see also Ball v. Halsell*, 161 U.S. 72, 79 (1896) (discussing *Bailey* and noting that the Assignment of Claims Act did not "enable the original claimant to recover of the United States a sum once paid by the United States to his attorney in fact, holding a power of attorney, *made before allowance of the claim and the issue of the warrant*, and remaining unrevoked") (emphasis added); *Freedman's Savs. & Trust Co. v. Shepherd*, 127 U.S. 494, 505-06 (1888) (noting that the Government could have refused to recognize an assignment because it failed to comply with the Assignment of Claims Act, but "[h]ere, the officers of the government chose to recognize the assignment"). In *Bailey*, the Government paid the assignee attorney-in-fact and recognized the assignment; this Court approved the practice. *See Bailey*, 109 U.S. at 440 ("It seems to us—looking at the mischiefs intended to be remedied by these statutes and giving the words of Congress a reasonable interpretation—that the claimants were not at liberty, as between the government and themselves, to question the right of the officers of the treasury to recognize the unrevoked authority which the latter had given [the agent assignee], without restriction as to time, to receive from any one whom it might concern to pay all sums of money due or to become due and payable . . . ."). Thus, this Court has approved the Government's practice of recognizing assignments that fail to meet the requirements of the Assignment of Claims Act.[8]

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[8] ACE and Delmarva assert that *McKnight v. United States*, 98 U.S. 179 (1878) concluded that the Government "could not waive" the Assignment of Claims Act on an "unascertained"

Moreover, ACE and Delmarva seek to invoke the Assignment of Claims Act to protect their interests to the detriment of the Government and PSEG. Yet, this Court has stated that private parties may not invoke the Assignment of Claims Act to void an assignment as against the United States or other private parties. *Bailey*, 109 U.S. at 439 (reasoning that where Government "officers chose to make payment to the person whom the claimant, by formal power of attorney, has accredited to them as authorized to receive payment, *the claimant cannot be permitted to make his own disregard of the statute the basis for impeaching the settlement had with his agent*") (emphasis added); *see also McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369 (1945) ("The provisions of the statute governing assignments of claims against the Government are for the protection of the Government and not for the regulation of the equities of the claimants as between themselves."); *Centron Corp. v. United States*, 585 F.2d 982, 986 n.3 (Ct. Cl. 1978) ("The Act . . . does not invalidate any contractual rights or equities as between the private parties to an assignment that does not satisfy the Act."). ACE and Delmarva have cited to no cases, and we know of none, where a private party successfully invoked the

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claim. Cert Pet. at 12. However, *McKnight* actually concluded that the Government may waive the Act by paying an assignee. *McKnight*, 98 U.S. at 185-86 ("It is true the assignment was contrary to law, and therefore a nullity, but there was nothing contrary to good morals or conscience in the payment or receipt of the money."). Also, *McKnight* did not involve an "unascertained" portion of a claim. The unpaid amounts in *McKnight* were not "unascertained," but instead related to the Government's decision to set off a debt owed by the assignor from the payment made to the assignees. *See id.* at 186.

Assignment of Claims Act to challenge the Government's waiver of the Act's requirements.

In contrast to the precedent discussed above, ACE and Delmarva seek to rely on the construction of the Assignment of Claims Act found in *Spofford v. Kirk*, 97 U.S. 484, 489-90 (1878), *United States v. Gillis*, 95 U.S. 407 (1877), *Nutt v. Knut*, 200 U.S. 12 (1906), and *National Bank of Commerce v. Downie*, 218 U.S. 345 (1910). *See* Cert Pet. at 12-16. Yet, the Federal Circuit was correct to limit the reach of this line of cases. This Court itself did so over 70 years ago. In 1937, this Court reviewed these exact four cases, noted that they strictly construed the Act, but also noted that "[a]nother line of cases exhibit an opposing tendency." *Martin*, 300 U.S. at 596 (citing, *inter alia*, *Goodman*, *Bailey*, and *Freedman's Savings*).[9] The Court expressed its preference for the second line of cases, which "teach us that the statute must be interpreted in the light of its purpose to give protection to the Government." *Id.; see also id.* at 597 ("To the extent that the two lines of cases are in conflict, the second must be held to be supported by the better reason."). Thus, this Court rejected ACE and Delmarva's primary contention over 70 years ago.[10]

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[9] Long before *Martin*, in *Bailey* this Court distinguished *Spofford*'s construction of the Assignment of Claims Act to void an assignment between two private parties. *Spofford*, 97 U.S. at 489-90. In *Bailey*, this Court acknowledged that "[n]o question arose in that case [*Spofford v. Kirk*] as to what would have been the effect upon the rights of the claimant had the officers of the government recognized the assignment to Spofford." *Bailey*, 109 U.S. at 437.

[10] ACE and Delmarva failed to mention *Martin*, much less distinguish it in their petition.

II. THE FEDERAL CIRCUIT'S CONCLUSION NEITHER CONFLICTS WITH *DOW* NOR EXTINGUISHES A FIFTH AMENDMENT TAKINGS CLAIM

Contrary to Petitioners' assertion, Cert Pet. at 9-11, the Government may recognize an assignment of a takings claim and waive the Assignment of Claims Act just as it may do so for any other type of assigned claim. The Federal Circuit's conclusion below does not conflict with *United States v. Dow*, 357 U.S. 17 (1958). Nor do the decisions below extinguish any takings claims under the Fifth Amendment, because PSEG has pled a takings claim against the Government (albeit under a different theory of recovery).

In *United States v. Dow*, the Government actively opposed an assignment of a takings claim and moved for summary judgment, seeking dismissal of the assignee-plaintiff's untimely claim as filed outside the statute of limitations. *See, e.g., Dow*, 357 U.S. at 19. The Government did not waive the Assignment of Claims Act; quite the opposite. The Government actively opposed the assignee's right to make a claim. Here, the Government has recognized the assignment consistent with the conclusion of a confirmed arbitration decision between PSEG, ACE, and Delmarva.

ACE and Delmarva also misread the import of *Rochester Gas & Elec. Co. v. United States*, 65 Fed. Cl. 431 (2005). *See* Cert Pet. at 11. The Government never recognized the assignment of the takings claim involved in *Rochester*. *See generally Rochester*, 65 Fed. Cl. at 441-42. Moreover, unlike here, the buyer in *Rochester* did not previously own and operate the nuclear plant at issue. *See id.* at 433. Additionally, the sale in *Rochester* only involved a partial assignment, leaving the seller with future obligations to the

Government such as the "one-time fee payment" owed to the Government when performance eventually begins under the Standard Contracts. *See id.* Here, the assignment was complete, not partial; and, in fact, the arbitration panel noted that "[i]t is hard to imagine a more comprehensive assignment of claims." PSEG App. at 18a.[11]

Also, ACE and Delmarva exaggerate the effect of the Federal Circuit's ruling, claiming it will "extinguish" a takings claim here and allow the Government "*to prevent any property owner* from receiving just compensation for a taking" under the Fifth Amendment in numerous other cases. Cert Pet. at 11, 19 (emphasis in original). Here, however, PSEG is pursuing a takings claim against the Government regarding the Hope Creek and Salem plants, albeit under a different theory of recovery. The Government's recognition of the assignment to PSEG has not extinguished the takings claim merely because PSEG is pursuing the takings claim under a different theory than ACE and Delmarva intended to pursue. There is no danger in this case (or in similar suits in-

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[11] In view of Petitioners' reliance on *Rochester*, it is noteworthy that the trial judge in *Rochester* later dealt with the assignment issue in another spent nuclear fuel case—*Boston Edison Co. v. United States*, 80 Fed. Cl. 468 (2008)—in which he emphasized the importance of looking at the specific assignment language in a purchase agreement. In *Boston Edison*, the trial judge recognized the comprehensive nature of the assignment language in the agreements between Delmarva, ACE, and PSEG. *See Boston Edison*, 80 Fed. Cl. at 496 (discussing *Delmarva*, 79 Fed. Cl. at 216 and noting that ACE and Delmarva "had no cause of action after assigning their claims against the DOE"). Ultimately, *Rochester* and *Boston Edison* support PSEG's position that each case requires a fact-intensive review and, because of this, the resolution of this case will have little effect on other spent fuel cases currently pending.

volving competing claims by an assignor and assignee) that takings will go uncompensated. As occurred here, the Government will have the discretion (as it always has) to recognize an assigned takings claim and litigate with the assignee alone. No takings claim has been extinguished, just the assignors' ability to recover a share of any just compensation after they had bargained away these claims when they sold their minority interests in the nuclear plants.

The case law does not support ACE and Delmarva's characterization that the assignment of a takings claim is somehow unique and different from other assignments subject to the Assignment of Claims Act; or, that the Government's recognition of an assignment somehow extinguishes a right to just compensation. Regardless of the type of claim involved, the law allows the Government to recognize an assignment that fails to comply with the various technical requirements of the Act.

III. THIS CASE IS MOOT, BECAUSE ACE AND DELMARVA ARE NO LONGER THE REAL PARTIES IN INTEREST AND HAVE NO FURTHER CAUSE OF ACTION

While the Federal Circuit properly concluded that the Government could recognize ACE and Delmarva's assignment of their claims to PSEG, the Federal Circuit would have been equally justified in concluding that ACE and Delmarva no longer constitute the real parties in interest and have no further cause of action due to the assignment. The CFC, in fact, concluded that it lacked jurisdiction to invalidate the arbitration award. *See Delmarva I*, 79 Fed. Cl. at 210, 213, Cert App. at 27a-29a. Given this finding, coupled with Petitioners' withdrawal of their appeal chal-

lenging the confirmation of the arbitration award in the New Jersey courts, the instant appeal no longer states a viable cause of action. The appeal is moot.

Under Article III of the Constitution, this Court only has power to render a decision based on an actual case or controversy; and federal courts are not "'empowered to decide moot questions or abstract propositions . . . .'" *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (quoting *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920)). A parallel proceeding in another court may render a case moot by deciding an issue central to the litigation. *See Powell v. McCormack*, 395 U.S. 486, 496 (1969) ("Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."); *see also* 15 JAMES WM. MOORE *ET AL.*, MOORE'S FEDERAL PRACTICE § 101.93[3], at 101-176.1 (3d ed. 2008) ("When pending litigation involves a legal issue that is later disposed of in another forum, the resolution of the issue or claim may render the pending lawsuit moot, provided that the resolution of the claim in the other forum is conclusive."); 13B CHARLES ALAN WRIGHT *ET AL.*, FEDERAL PRACTICE & PROCEDURE § 3533.2.1, at 825-26 (3d ed. 2008) ("Mootness may result from action by the same tribunal or another one that forecloses relief rather than grants it.").

Here, the arbitration decision conclusively determined that ACE and Delmarva have no right to bring the claims in the instant case based on their assignment of those claims to PSEG. This Court has noted that a state court can enforce the transfer of claims between parties even if the assignment violates the Assignment of Claims Act. *See Segal v. Rochelle*, 382 U.S. 375, 384-85 (1966). The arbitration decision has

been confirmed in New Jersey Superior Court and ACE and Delmarva withdrew their appeal, which makes it final.

The confirmation of the arbitration decision in New Jersey state court should be accorded full faith and credit by this Court under Article IV, Section 1 of the U.S. Constitution and its implementing statute, 28 U.S.C. § 1738. *See Migra v. Warren City Schl. Dist. Bd. of Ed.*, 465 U.S. 75, 81 (1984) ("It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."); *Caldeira v. County of Kauai*, 866 F.2d 1175, 1178 (9th Cir. 1989) ("The state court's confirmation of the arbitration award constitutes a judicial proceeding for purposes of [28 U.S.C.] section 1738, and thus must be given the full faith and credit it would receive under state law."); *see also* 9 U.S.C. § 13(c) (2006) (an arbitration award confirmed in court "shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered"), PSEG App. at 75a. As between Petitioners and PSEG, Petitioners can no longer assert ownership of the claims and should be precluded from pursuing their claims. Ultimately, ACE and Delmarva are no longer the real parties in interest under Rule 17(a) of the Court of Federal Claims, which requires that "[e]very action shall be prosecuted in the name of the real party in interest." This case is moot, because ACE and Delmarva are no longer the real parties in

interest to pursue these claims and are precluded from asserting otherwise.[12]

Also, because ACE and Delmarva no longer own the claim, they no longer have a cause of action to pursue in the CFC. In another spent nuclear fuel case interpreting similar language in another purchase agreement for a nuclear station, the CFC concluded that the selling utility retained no claim and its case should be dismissed with prejudice. *Vt. Yankee Nuclear Power Corp. v. United States*, 84 Fed. Cl. 339, 340 (2008) ("Lacking any actionable claims that were not transferred to [the purchaser] in the sale of the Power Station, [the seller's] Complaint and First Amended Complaint are dismissed with prejudice."). The same conclusion applies here. ACE and Delmarva assigned their claims to PSEG and no longer have a cause of action to pursue (regardless of the effect of the Assignment of Claims Act). Even if this case were somehow returned to the CFC, the CFC will ultimately dismiss this case based on this alternative ground. Thus, this appeal is moot and ACE and Delmarva can receive no further relief.

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[12] Also, allowing ACE and Delmarva to continue their cases despite the arbitration decision would undermine the Federal Arbitration Act, 9 U.S.C. §§ 9 & 10, and the strong federal policy, which favors arbitration "to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info. Sciences, Inc. v. Bd. of Trs.*, 489 U.S. 468, 476 (1989). The Federal Arbitration Act limits review of arbitration decisions to the explicit grounds stated in the FAA and may not be expanded "to the point of evidentiary and legal review generally." *See Hall St. Assocs., LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008). ACE and Delmarva's continued pursuit of their cases in the federal courts undermines the binding arbitration award and constitutes a naked attempt to forum shop and re-litigate the unfavorable decision of the arbitration panel, which decision was reviewed, affirmed, and is final for all purposes in New Jersey.

CONCLUSION

For the foregoing reasons, ACE and Delmarva's Cert Petition should be denied.

Respectfully submitted,

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March 23, 2009

APPENDIX

APPENDIX A

IN THE MATTER OF THE ARBITRATION OF:

PSEG POWER LLC, and PSEG NUCLEAR LLC,
Claimants,

v.

PEPCO HOLDINGS, INC., ATLANTIC CITY ELECTRIC CO., and DELMARVA POWER AND LIGHT CO.,
Respondents.

ATLANTIC CITY ELECTRIC CO., and DELMARVA POWER AND LIGHT CO.,
Claimants,

v.

PSEG POWER LLC, and PSEG NUCLEAR LLC,
Respondents.

Opinion and Order

The parties have filed reciprocal arbitration demands seeking this Panel's consideration of whether PSEG Power LLC and PSEG Nuclear LLC (collectively, "PSEG") waived its right to arbitrate its claim that Atlantic City Electric Co. ("ACE") and Delmarva Power and Light Co. ("Delmarva," and, collectively with ACE, "ACE/Delmarva")[1] assigned Fifth-Amendment-based takings claims against the United States to PSEG, and, if not, whether such assignments were made. For the reasons outlined

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[1] Although PEPCO Holdings, Inc. ("PEPCO"), the parent of ACE and Delmarva, is named as a respondent in PSEG's demand, it is not a claimant in ACE/Delmarva's demand and apparently is not being represented by ACE/Delmarva's lawyers (according to the signature blocks on the briefs). Because there has been no attempt by PEPCO to object to the arbitration, it should be bound by this decision.

below, we find that PSEG did not waive or otherwise lose its right to arbitrate, and that the takings claims at issue were assigned to PSEG.

FACTS & PROCEDURAL POSTURE

The factual background is largely undisputed and is set forth in material part below.

I. SPENT NUCLEAR FUEL REGULATION

Spent nuclear fuel ("SNF") is fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing. 42 U.S.C. § 10101(23). Under the Nuclear Waste Policy Act of 1982 ("NWPA"), "the Federal Government has the responsibility to provide for the permanent disposal of . . . [SNF] as may be disposed of in order to protect the public health and safety and the environment." *Id.* § 10131(a)(4). However, "the costs of such disposal should be the responsibility of the generators and owners of such . . . [SNF]." *Id.*

Pursuant to the above mandate, the Department of Energy ("DOE") was tasked with constructing a facility for the long-term storage of SNF. *See id.* § 10131(b). In order to cover the costs of building and maintaining a facility to house SNF, among other materials, the NWPA authorized DOE "to enter into contracts with any person who generates or holds title to . . . [SNF] of domestic origin for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel." 42 U.S.C. § 10222(a)(1). Renewal of nuclear facilities' licenses to operate was conditioned on entering into such contracts. *Id.* § (b)(1)(A).

DOE adopted a form contract—the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-

Level Radioactive Waste (the "Standard Contract" or "Contract")—that nuclear facilities were required to execute. 10 C.F.R. § 961.11. Under the Standard Contract, nuclear facilities pay a one-time fee for past nuclear energy production and a continuing fee for on-going production, *id.* art. VIII.B, and DOE was required to complete its storage facility by January 31, 1998. The nuclear facilities upheld their end of the bargain, but DOE did not. DOE projects that a federal storage facility will be available at the earliest by 2010, if then. 59 Fed. Reg. 27007, 27008 (May 25, 1994).

II. THE PURCHASE AGREEMENTS

On September 27, 1999, PSEG purchased ACE/Delmarva's minority interests in three facilities: Hope Creek Station ("Hope Creek"), Salem Station ("Salem") and Peach Bottom Station ("Peach Bottom," and, collectively with the other facilities, the "Facilities") pursuant to three purchase agreements (the "PAs").[2] *See* Opening Jurisdictional Brief of ACE/Delmarva at 2. PSEG also purchased the majority interests in Hope Creek and Salem from Public Service Electric & Gas Co. ("PSE&G").

The PAs define the Purchased Assets to include SNF. PAs § 2.1(c) (including Nuclear Materials, a term defined in § 1.1(91) to include SNF). Section 2.6 gives PSEG "all rights of recovery from third parties and the Department of Energy relating to, arising from or in connection with the [DOE's] failure to take [SNF]."

Similarly, Section 2.1(l) includes in the purchased assets:

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[2] The PAs govern different facilities, but their substantive terms are identical. Opening Merits Br. of PSEG at 3.

> All claims of Seller [ACE/Delmarva] relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract (including all claims for failure by the Department of Energy to take Spent Nuclear Fuel) accrued prior to, on or after the Closing Date, whether relating to periods prior to, on or after the Closing Date, and all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets, other than the claims describe in Section 2.2(l).[3]

Section 2.1(m) adds:

> [t]he rights of Seller in, to and under all causes of action against third parties with respect to, arising out of or in connection with Seller's rights, title and interests in and to the Purchased Assets or the Assumed Liabilities, or any portion thereof, whether accruing prior to, on or after the Closing Date, other than any such causes of action as constitute Excluded Assets or Excluded Liabilities, whether received as payment or credit against future liabilities, in each case, relating to any period prior to, on or after the Closing Date, other than the claims described in Section 2.2(m).[4]

PSEG also bargained for the right "exclusively to control, defend and settle any suit, action or proceeding, and any investigation arising out of or related

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[3] The § 2.2(l) carve-out is for DOE refunds for decontamination and decommissioning costs.

[4] The § 2.2(m) carve-out is for particular litigations of no relevance here. The other Excluded Assets are also not pertinent to the present issues.

to any Purchased Assets or Assumed Liabilities . . . ." PAs § 2.5(b).

The PAs have a standard no-waiver clause, providing that "[t]he failure of a Party to this Agreement to assert any of its rights under this Agreement or otherwise shall not constitute a waiver of such rights." PAs § 10.5.

The PAs are governed by New Jersey law, PAs § 10.10, and provide for arbitration under the American Arbitration Association rules of "any dispute between Seller and Buyer . . . relating to or arising out of any provision of" the PAs, PAs § 8.6.

III. THE LITIGATIONS

The current arbitration concerns separate actions brought against DOE by PSEG and ACE/Delmarva, respectively. The first was brought by PSEG to recover for, among other things, DOE's breach under the Standard Contracts in failing to take SNF by 1998. Later, ACE/Delmarva sued DOE for failure to provide just compensation pursuant to the Fifth Amendment in exchange for the "taking" that resulted from its failure to take SNF.

A. PSEG's Suit Against DOE

PSEG filed its suit in the Court of Federal Clams ("CoFC") on September 26, 2001. That suit contains claims for breach of the Standard Contracts, for breach of the implied covenant of good faith and fair dealing, and to recover compensation for a taking. Sellers' Appendix ("SA"), Tab 2 at 8-11. The facts underlying all claims are that DOE promised to take SNF from Hope Creek and Salem Station, but failed to do so, and also kept the money paid to DOE under

the Standard Contracts.[5] On January 6, 2004, PSEG amended its complaint to add PSE&G as a plaintiff, presumably in case DOE argued that the takings claims were not transferable by PSE&G.

On January 31, 2005, the CoFC dismissed PSEG's breach of contract claims on jurisdictional grounds and stayed the remaining claims pending appeal. PSEG's Appendix ("PA") at A16. On November 20, 2006, some 22 months later, the Federal Circuit reversed the CoFC's jurisdictional ruling. PA at A37.

On January 5, 2007, DOE moved to consolidate PSEG's case with ACE/Delmarva's, and PSEG's case was subsequently stayed on PSEG's motion for stay pending completion of binding arbitration. PA at A46.

B. ACE/Delmarva's Suit Against DOE

On September 26, 2003, representatives of ACE/Delmarva met with representatives of PSEG to discuss

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[5] PSEG did not sue DOE with respect to Peach Bottom because its contract claims against the DOE were settled prior to the filing of the PSEG suit by Peach Bottom's majority owner Exelon. While the settlement was rejected by the Eleventh Circuit for certain reasons regarding the source of the funds, a subsequent settlement was reached after the rejection. Transcript of Arbitration Proceedings of May 24, 2007 ("Tr.") at 157:8-158:22. Counsel for ACE/Delmarva argued that the Peach Bottom settlement shows that the government is open to settling SNF contract claims without settling the takings claims. *Id.* at 107:24-108:6. But Counsel for PSEG responded that the government's current insistence that PSEG settle its contract claims with all associated takings claims comes from the government's experience in settling Peach Bottom, as, while it believed it was ending the entire matter with the settlement, it found itself facing takings claims notwithstanding the settlement. *Id.* at 135:18-136:14. Whether the government is willing to settle the SNF contract claims in the absence of the takings claims is not relevant here; we must simply decide who owns the takings claims.

ACE/Delmarva's intention to sue DOE based on takings claims that ACE/Delmarva believed it could bring arising from DOE's failure to take SNF from the Facilities. Opening Jurisdictional Br. of ACE/Delmarva at 3. PSEG asserted that any such lawsuit would contravene the PAs, as all claims were assigned to PSEG. *Id.* ACE/Delmarva apparently explained why it believed the takings claims were distinct from the assigned claims, and PSEG offered no response. *Id.* (citing Affidavit of Nicholas W. Mattia, at SA Tab 1 ¶¶ 4-10); *see also* Declaration of Harold W. Borden at A3-A5 in 2-8.

ACE and Delmarva filed separate takings actions in the CoFC on January 13, 2004. On December 2, 2004, both ACE and Delmarva added "protective" breach of contract and breach of the implied covenants of good faith and fair dealing claims (making the suits essentially identical to the PSEG suit). The ACE and Delmarva cases were consolidated on January 21, 2005. The CoFC denied DOE's motion for summary judgment in the consolidated case on July 1, 2005.

ACE/Delmarva then subpoenaed documents from PSEG on September 29, 2005. In response, on October 6, 2005, PSEG again asserted that ACE/Delmarva had no right to pursue the takings claims under the PAs and requested that those claims be voluntarily dismissed forthwith. Documents Relating to ACE/Delmarva–PSEG Arbitration ("Documents"), Tab II.C. PSEG also threatened to initiate arbitration under the PAs if ACE/Delmarva continued to press the takings claims. *Id.* ACE/Delmarva replied by letter (from an officer of Pepco Holdings, Inc.) that it would not dismiss those claims because it did not believe that they overlapped PSEG's claims and it did

not intend to and could not have transferred them in the PAs. Documents, Tab II.D. PSEG replied with a letter reiterating its position regarding assignment of the claims and another letter objecting to the subpoena. Documents, Tabs II.E & II.F.

ACE/Delmarva moved on January 12, 2006 to compel production. PSEG responded by again asserting that the takings claims did not belong to ACE/Delmarva in light of the PAs. The CoFC granted the motion to compel (without ruling on PSEG's assignment claims), SA, Tab 5; SA, Tab 8 at 7 (noting that the CoFC "has not addressed the issue of the impact of the assignment of claims directly"), and PSEG produced the requested documents.

On January 5, 2007, DOE moved to consolidate the ACE/Delmarva and PSEG cases. ACE/Delmarva opposed consolidation (as did PSEG). *See* PA at A43; Opening Jurisdictional Brief of PSEG, at 11; Tr. at 47:13-48:11. PSEG followed this with a Notice of Dispute under the PAs to ACE/Delmarva. Pursuant to the Notice of Dispute, on April 5, 2007, PSEG served ACE/Delmarva with the arbitration demand that resulted in this proceeding. ACE/Delmarva responded on April 16, 2007 with its own arbitration demand, which was superseded by an amended demand served April 23, 2007.

Judge Miller issued an order on April 12, 2007 denying in part without prejudice and granting in part[6] DOE's consolidation motion and stayed the case temporarily pending this arbitration. SA, Tab 8 at 2.

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[6] It is not clear what part of the motion was granted. *See* Tr. at 130:5-10.

C. The Arbitration Claims

PSEG's arbitration demand seeks declarations that: (1) ACE/Delmarva assigned all claims including the takings claims to PSEG under the PAs; (2) PSEG received the right to control all litigations concerning SNF including the takings claims under the PAs; (3) ACE/Delmarva breached the PAs by initiating the Delmarva litigation and by refusing to dismiss; (4) ACE/Delmarva breached the PAs by not giving PSEG pre-closing notice of the existence of the takings claims; (5) ACE/Delmarva breached the PAs by failing to attempt to secure the government's consent to assign the takings claims to PSEG; and (6) the PAs obligate ACE/Delmarva to assign to PSEG all earnings from the takings claims.

ACE/Delmarva's demand seeks: (1) consideration of ACE/Delmarva's claim that PSEG's Notice of Dispute and demand for arbitration are invalid; (2) a declaration that the Notice of Dispute and arbitration demand are barred by laches or contain claims not subject to arbitration; and (3) a dismissal of the claims set forth in PSEG's arbitration demand.

ANALYSIS

I. The Claims At Issue Are Arbitrable

ACE/Delmarva contends that the present dispute over whether it assigned the SNF takings claims to PSEG is beyond the scope of the arbitration clauses in the PAs. Opening Jurisdictional Br. of ACE/Delmarva at 18. Although ACE/Delmarva recognizes that the clauses are broad enough to encompass any dispute arising out of any provision of the PAs, it contends that, because the takings claims are not assignable and cannot provide PSEG with any benefit, they cannot arise out of any provision of the

PAs. *Id.* This argument is essentially a recasting of ACE/Delmarva's arguments as to why the claims were not assigned by the PAs. But it seems to us logical to the point of being tautological that, if the PAs confer on this Panel jurisdiction to decide whether certain claims ***were*** assigned, we must also have jurisdiction to decide whether the same claims ***were not*** assigned. ACE/Delmarva does not appear to contend that the Panel lacks jurisdiction over the former question, only over the latter. Accordingly, ACE/Delmarva's contention that the present disputes are beyond the scope of the arbitration clause is without merit.

II. PSEG'S CLAIMS HAVE NOT BEEN WAIVED

ACE/Delmarva's more serious objection to arbitrability is that PSEG lost its right to arbitrate this dispute due to its litigation conduct in the ACE/Delmarva case and its delay in bringing this arbitration. Initially, we must decide whether this question is more properly addressed by the CoFC.

A. This Panel May Resolve the Waiver/Laches/Estoppel Question

"The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983). ACE/Delmarva asserts that this general rule does not apply to its allegation here that PSEG waived arbitration through litigation conduct, relying principally on the Third Circuit's recent decision in *Ehleiter v. Grapetree Shores, Inc.*, 482

F.3d 207 (3d Cir. 2007), in which the court stated that it "has long decided questions of waiver based on litigation conduct instead of referring the issue to an arbitrator." *Id.* at 217.

Ehleiter and the cases discussed therein involve parties litigating before a particular court when one of those parties moves for a stay in order to arbitrate, and the other objects based on the movant's waiver of the arbitration right through litigation conduct. Those cases hold that, as is apparent, a court is both in a better position and more suited than arbitrators to determine whether the litigation conduct at issue evinces a waiver, and to control its own proceedings and address abuses of the judicial system. *See, e.g.*, *Ehleiter*, 482 F.3d at 218.

Here, on the other hand, the parties have not been litigating the merits of their cases before the same Judge, and there continues to be no court case to which both ACE/Delmarva and PSEG are parties. Indeed, ACE/Delmarva has opposed DOE's consolidation motions that would put both parties before the same Judge. Thus, no court is in any better position than this Panel to determine whether PSEG's litigation conduct waived its arbitration rights. Judge Miller, when given the opportunity to deny a stay in the ACE/Delmarva case based on PSEG's litigation conduct, declined to do so.[7] SA, Tab 7 at 8. Moreover,

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[7] ACE/Delmarva's assertion that Judge Miller "retained jurisdiction of [sic] the question whether [PSEG] by its delay and litigation conduct has waived the right to arbitrate," Opening Jurisdictional Br. of ACE/Delmarva at 11, is actually contradicted by the statement by the court upon which it relies. The court said that "should the arbitrators fail to consider delay in the arbitration proceeding, the court cautions [the] parties that it will address the issue." SA, Tab 7 at 8-9. This implies that

ACE/Delmarva itself submitted the litigation waiver issue to this Panel in its arbitration demand, and did not suggest that this Panel did not have jurisdiction to decide the issue until weeks later.[8]

In sum, we do not believe that *Ehleiter* stands for the proposition that only a court may decide issues of waiver of arbitrability based on litigation conduct. *See Ehleiter*, 482 F.3d at 221 ("[W]e hold that waiver of the right to arbitrate based on litigation conduct remains ***presumptively*** an issue for the court to decide. . . .") (emphasis added). This is especially true in a case, such as this, in which both parties have submitted the issue to arbitration and there is no single court before which both parties' litigation conduct took place. Accordingly, we have jurisdiction to consider ACE/Delmarva's litigation waiver defense to arbitration.

B. PSEG Did Not Forfeit its Right to Arbitration

ACE/Delmarva relies on three related theories to contend that PSEG forfeited its rights to arbitration: waiver through litigation conduct, laches and equita-

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this Panel can decide the issue, and if it does, then the court need not do so.

To the extent that ACE/Delmarva is contending that Judge Miller erred in granting the stay because she did not rule on the litigation conduct waiver question, that is an issue for the Federal Circuit, not this Panel.

[8] ACE/Delmarva's contention that it "can hardly [be] fault[ed] for the fact that the [*Ehleiter*] issue was raised on May 9th; *Ehleiter* was raised by the Panel at the outset of the prehearing conference," Responsive Jurisdictional Br. of ACE/Delmarva at 3, is puzzling. *Ehleiter* did not establish new law in the Third Circuit and ACE/Delmarva could have raised the issue before Judge Miller or in an answer to PSEG's arbitration demand.

ble estoppel. ACE/Delmarva has the burden of proving these defenses. *See Great Western Mortgage Corp. v. Peacock* 110 F.3d 222, 233 (3d Cir. 1997) ("Given the burden that Peacock bears in demonstrating waiver, and her lack of evidence in support of her assertions, we are satisfied that Great Western clearly preserved the right to refer Peacock's claim to arbitration. As we have stated, waiver is not to be lightly inferred.").

1. Waiver by Litigation Conduct

In order to show that PSEG waived its right to arbitrate the question whether the takings claims at issue were assigned under the PAs, ACE/Delmarva must show, among other things, that the conduct caused it prejudice. "'[P]rejudice is the touchstone for determining whether the right to arbitrate has been waived' by litigation conduct." *Ehleiter*, 482 F.3d at 222 (quoting *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 925 (3d Cir. 1992)). A "nonexclusive list of factors relevant to the prejudice inquiry" with respect to litigation conduct includes: "[1] the timeliness or lack thereof of a motion to arbitrate . . . [; 2] the degree to which the party seeking to compel arbitration [or to stay court proceedings pending arbitration] has contested the merits of its opponent's claims; [3] whether that party has informed its adversary of the intention to seek arbitration even if it has not yet filed a motion to stay the district court proceedings; [4] the extent of its non-merits motion practice; [5] its assent to the [trial] court's pretrial orders; and [6] the extent to which both parties have engaged in discovery." *Id.* at 222-23 (quoting *Hoxworth*, 980 F.2d at 926-27).

Here, the first factor—timeliness—is offset by the third—notice of intent to seek arbitration. Although

PSEG delayed in filing this arbitration after being on notice that ACE/Delmarva was litigating the takings claims, it made clear to ACE/Delmarva from the outset its objections and intention to arbitrate. The remaining factors are difficult to assess; PSEG's litigation conduct has not been as a party to ACE/Delmarva's suit, but rather as a third-party opposing a document subpoena in that case. Indeed, the factors listed above measure the ***voluntary*** actions in the litigation at issue by the party seeking arbitration. Such action is absent here. All of PSEG's actions taken in ACE/Delmarva's suit identified by ACE/Delmarva—"opposing amotion to compel discovery, later producing 38,500 pages of documents [under court order] and more recently responding to the Court's Order to Show Cause," Opening Jurisdictional Br. of ACE/Delmarva at 13—were involuntary. ACE/Delmarva has failed to carry its burden of showing that PSEG actively participated in the takings litigation so as to waive its right to arbitration of the present claims.

2. Laches And Equitable Estoppel

For ACE/Delmarva to prevail on the defense of laches, it must show both an unexplained and inexcusable delay by PSEG in asserting its rights, and resulting prejudice. *Mitchell v. Alfred Hofmann Inc.*, 48 N.J. Super. 396, 403 (App. Div. 1958); *see also Kepner-Tregoe, Inc. v. Executive Dev., Inc.*, 79 F. Supp. 2d 474, 487 (D.N.J. 1999).

ACE/Delmarva argues that PSEG delayed over three years in filing this arbitration after being given notice of ACE/Delmarva's intention to file takings claims, and also acquiesced in ACE/Delmarva's assertion of those claims by adding PSE&G to its own suit containing takings claims for Hope Creek and Salem.

However, the latter point suggests that PSEG agreed with ACE/Delmarva that PSEG itself might not be able to bring the takings claims—and has nothing to do with whether PSEG thought that the claims were assigned under the PAs.

There is no dispute that PSEG waited over three years from the filing of ACE/Delmarva's suit to file its dispute notice that initiated this arbitration. But ACE/Delmarva must show that this delay was inexplicable and unreasonable—that it "lull[ed] [it] into a false sense of security or belief that [PSEG] acquiesced in what [ACE/Delmarva] [was] doing." *Murphy v. Trapani*, 255 N.J. Super. 65, 75 (App. Div. 1992). It has not made this showing. PSEG objected repeatedly to ACE/Delmarva proceeding with the takings claim, based on the PAs' assignment of the claims and its rights to arbitrate over the objections. *See id.* (rejecting laches defense despite two-year delay in filing as plaintiffs immediately complained about defendants actions when they were taken); *see also King v. Innovation Books*, 976 F.2d 824, 832-33 (2d Cir. 1992) (rejecting laches when plaintiff had timely warned defendants of his claims). All of PSEG's actions were consistent with its belief that ACE/Delmarva assigned all of its rights to PSEG, including the takings claims.[9] ACE/Delmarva was on

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[9] The dissent points to a letter from PSEG to ACE/Delmarva dated April 20, 2005 in which PSEG stated that it "simply has no interest or desire to prosecute or defend" the sort of claims ACE/Delmarva was pressing in the ACE/Delmarva litigation, and suggests that statement is irreconcilable with PSEG's position here. We disagree. It is one thing to have no interest in pursuing a particular legal theory or claim, perhaps for strategic or valuation reasons, but quite another to yield to another the right to pursue that theory or claim. PSEG's April 20 letter suggests only the former, and its communications both before and

notice of PSEG's objections, and knew as well their basis in the clear language of the PAs discussed below. Nonetheless, it proceeded to litigate. If ACE/Delmarva wanted to resolve PSEG's stated objections sooner, it could have filed for arbitration. ACE/Delmarva's litigation was undertaken with a clear-eyed awareness of the risks, including the cost of legal fees.

We also observe that the PAs themselves plainly state that non-assertion of rights shall not be construed as a waiver of those rights. Although the prevailing view is that such clauses themselves may be waived by agreement or conduct, *see* 13 Williston on Contracts § 39:36 (4th ed. 2007 supp.), here PSEG's conduct was consistent with the non-waiver clause.

PSEG's delay in bringing an arbitration while its own claims before the CoFC were dismissed is perhaps understandable. During the period before its claims were resurrected, PSEG stood to gain little if anything from expending its efforts and money in arbitrating against ACE/Delmarva over claims it could not bring without DOE's consent. Accordingly, it was logical for PSEG to stand by during the pendency of its appeal after having already made its objections and their basis clear to ACE/Delmarva.

Because of PSEG's repeated assertions of its rights under the PAs and the PAs' non-waiver clause, we find on balance that PSEG's delay was not unreasonable and should not have led ACE/Delmarva to conclude that PSEG acquiesced in its takings suit; there-

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after the April 20 letter (orally in September 2003 and by a letter dated October 6, 2005) explicitly deny the latter.

fore we reject the laches defense.[10] For the same reasons, we reject ACE/Delmarva's equitable estoppel defense.

III. ACE/DELMARVA ASSIGNED THE TAKINGS CLAIMS TO PSEG

Having rejected ACE/Delmarva's jurisdictional and equitable defenses, we now reach the merits of the dispute—whether ACE/Delmarva assigned the takings claims to PSEG in the PAs.

A. The Takings Claims Are Clearly Covered by the Assignments in the PAs

Under the PAs, ACE/Delmarva assigned "[a]ll claims of Seller [ACE/Delmarva] relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract (including all claims for failure by the Department of Energy to take Spent Nuclear Fuel) . . . and all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets." PAs § 2.1(l). The PAs also grant PSEG "all rights of recovery from third parties

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[10] Although we do not reach the second element of laches—prejudice—we note in passing that ACE/Delmarva's proof of prejudice appears to be thinner than ACE/Delmarva suggests. ACE/Delmarva contended at argument that prejudice should be measured hypothetically, in that, had PSEG brought its arbitration claim in the fall of 2003, it likely would have included Peach Bottom and, had PSEG won, ACE/Delmarva never would have brought its suit at all. Tr. at 80:5-81:5. However, we believe that prejudice should be measured based on what actually happened. In other words, the proper question is, in light of the delay, what did ACE/Delmarva do that would be to its detriment if it now loses this arbitration. ACE/Delmarva is not contending that the Peach Bottom settlement was contrived in bad faith to rebut its prejudice argument here. Tr. at 107:8-10.

and the Department of Energy relating to, arising from or in connection with the [DOE's] failure to take [SNF]." *Id.* § 2.6. PSEG further received the right "exclusively to control, defend and settle any suit, action or proceeding, and any investigation arising out of or related to any Purchased Assets [which include SNF]." *Id.* § 2.5(b).

These broad assignments make no exceptions for particular kinds of claims, and the detailed Excluded Assets list in the PAs make no mention of any takings claims. *See* PAs § 2.2. It is hard to imagine a more comprehensive assignment of claims. On their face, the PAs leave no doubt that the takings claims at issue here were assigned to PSEG and that PSEG received the exclusive right to control the litigation over the claims.

In the face of this unmistakable language, ACE/Delmarva makes two principal arguments as to why the takings claims were not assigned: (1) they arise independent of the Standard Contract, and (2) they could not have been assigned as a matter of law.

The first argument ignores the second half of § 2.1(l), which goes beyond claims arising out of the Standard Contract and covers "all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets," as well as § 2.6, which confers to PSEG "all rights of recovery from third parties and the Department of Energy relating to, arising from or in connection with the Department of Energy's failure to take Spent Nuclear Fuel." The Purchased Assets explicitly include SNF, and the takings claims indisputably arise out of or are in connection with DOE's failure to take SNF. Accordingly, it is irrelevant whether the takings claims arise from the Standard Contract or

from some other source—in either case, they are covered by the PAs assignment clauses."[11]

As to the second argument, ACE/Delmarva contends that the Assignment of Claims Act (or Anti-Assignment Act)[12] bars an assignment of the claims and, alternatively, that takings claims are "personal" and cannot be assigned in any event.[13] We need not

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[11] We note that, while ACE/Delmarva quotes Judge Miller's opinion denying summary judgment in stating that "[t]he court also noted that Sellers' takings claim 'is not predicated upon any rights emanating from the Standard Contract,'" Opening Jurisdictional Br. of ACE/Delmarva at 5, this is a distortion of the actual statement. The opinion was simply describing another opinion in stating that a takings claim ***might*** be viable "***insofar*** as the takings claim is not predicated upon any rights emanating from the Standard Contract." SA, Tab 4 at 4 (emphasis added). This is hardly an actual finding that the claim does not arise from the rights in the Standard Contract. Indeed, the very opinion that Judge Miller was describing—*Boston Edison Co. v. United States*, 64 Fed. Cl. 167 (2005)—found that, if both a takings claims and a contract claim simultaneously existed, the contract claim would provide the preferable basis for recovery. *Id.* at 187; *cf. Slack v. McDaniel*, 529 U.S. 473, 485 (2000) ("[T]he 'Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . .'") (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

[12] While ACE/Delmarva points out that the Assignment of Claims Act, 31 U.S.C. § 3727 is different from the Anti-Assignment Act, 41 U.S.C. § 15, courts have often referred to the Assignment of Claims Act as the Anti-Assignment Act (for obvious reasons) and we use the terms interchangeably to refer to the former statute.

[13] To the extent that ACE/Delmarva's position is that the anti-assignment statute should be considered by the Panel in determining whether ACE/Delmarva ***intended*** to assign the takings claims, it must be rejected. The PAs are unambiguous

dwell on the latter point, as ACE/Delmarva offers no authority in support of it nor any rationale to distinguish takings claims from any other claim with respect to assignability.[14]

The Anti-Assignment Act argument fails for two independent reasons: (1) the Act is not absolute, and therefore cannot render an assignment void *ab initio*, and (2) the Act may not be invoked by a party other than the United States.

It is undisputed that the government may consent to an assignment of a claim that would otherwise violate the Anti-Assignment Act. *See, e.g., Vt. Yankee Nuclear Power Corp. v. United States*, 73 Fed. Cl. 236, 240 (2006) ("The prohibitions of the Anti-Assignment Acts notwithstanding, 'assigned contracts are valid when the assignment takes place by operation of law, or when the government consents to and recognizes the assignment.'") (quoting *Rochester Gas and Elec. Corp. v. United States*, 65 Fed. Cl. 431, 437 (2005)). Accordingly, ACE/Delmarva's contention that it could not have assigned the takings claims at issue rings

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on this point, and therefore intent is irrelevant. Counsel for ACE/Delmarva recognized as much at argument, and it appears that the parties have agreed that the PAs are unambiguous and are not presenting evidence as to intent. *See, e.g.*, Tr. at 21:12-17; 109:20-110:18; 140:14-17.

[14] ACE/Delmarva's argument is essentially that the claims are *per se* unassignable because the buyer of such a claim would be doubly benefiting—both from the depreciated value of the subject of the sale and from the takings claim. But this presupposes that none of the purchase price is attributable to the claim itself. Because that assumption is not a necessary one, ACE/Delmarva's justification for the assignment bar is unconvincing. Even if the assumption were correct, it could simply reflect the parties' views of the merits of the claim at the time the PA's were executed.

hollow; although it may be true that the government generally would not agree to such an assignment, that does not change the fact that it is at least possible for the assignment to take place.

Moreover, even if the Anti-Assignment Act does bar PSEG from asserting the claim, that Act may not be invoked by ACE/Delmarva to void the assignment. "The Anti-Assignment Act is for the government's protection and only the United States may assert it." *United States v. Certain Space in Property Known as Chimes Bldg.*, 320 F. Supp. 491, 496 (N.D.N.Y. 1970), *aff'd*, 435 F.2d 872 (2d Cir. 1970). While "[a]n invalid attempted assignment does not forfeit the claim [(]it leaves it as it was before the purported assignment[),] . . . the assignment remains enforceable as between the parties to the assignment." *Saint John Marine Co. v. United States*, 92 F.3d 39, 45 (2d Cir. 1996); *see also* 91 Sonja Larsen *et al.*, Corpus Juris Secundum: United States § 196 ("[T]he invalidity of the assignment will not enable the assignor to recover from the United States after it has paid the claim to the assignee."). ACE/Delmarva does not point to any cases in which the Act has been used to invalidate an assignment as between private parties.

ACE/Delmarva argues that it must be able to bring the takings claims if PSEG may not bring them. Assuming that DOE would not consent to the assignment and that PSEG may not bring the takings claims, ACE/Delmarva's argument still relies on the incorrect assumption that some party has to be able to bring the claims. Indeed, ACE/Delmarva goes so far as suggesting that it would be ***unconstitutional*** for a governmental taking to go uncompensated. *See, e.g.*, Responsive Merits Br. of ACE/Delmarva at 2-3. That is simply an overstatement. Indeed, if the fail-

ure to take SNF actually does constitute a taking, it could go uncompensated if neither ACE/Delmarva nor PSEG actually sought compensation from DOE. It is not reasonable to interpret the Anti-Assignment Act, which exists solely to protect the government, to force the government to answer for claims against it.

In sum, we find that the PAs' comprehensive assignment language included the takings claims at issue and that the Assignment of Claims Act does not alter that conclusion or void the assignment as between ACE/Delmarva and PSEG. Accordingly, PSEG was assigned both the claims themselves and the right to control litigation over them.

B. ACE/Delmarva's Judicial Estoppel Argument Is Without Merit

ACE/Delmarva contends that PSEG's "pursu[it] [of] a sellers takings claim on behalf of one of its sellers [PSE&G]" is flatly inconsistent with its position that ACE/Delmarva has no right to pursue its takings claim. This argument suffers from multiple weaknesses.

The doctrine of judicial estoppel bars a party from asserting a position contrary to a position that the party has successfully asserted in previous litigation. *Murray v. Silberstein*, 882 F.2d 61, 66 (3d Cir. 1989); *Wein v. Morris*, 388 N.J. Super. 640, 658 n8 (App. Div. 2006). Here, the allegedly inconsistent positions identified by ACE/Delmarva are not in fact inconsistent at all. PSEG is not asserting in this proceeding that the takings claims at issue are not legitimate; it is asserting that they were assigned under the PAs. Moreover, PSEG has not prevailed on any position with respect to this claim, and therefore cannot be judicially estopped.

IV. ACE'S WINDFALL ARGUMENTS CANNOT OVERCOME THE PLAIN LANGUAGE OF THE PAS

The theme behind ACE/Delmarva's arguments on the merits is that a finding that PSEG acquired the takings claims would lead to a windfall in favor of PSEG. As the argument goes, ACE/Delmarva sold its interests in the plants for less than they were worth because of DOE's failure to take SNF, and, if PSEG may assert the claims for this diminished value, it is recovering twice for the value—once in the discount and again in the recovery. Whatever rhetorical force this argument may have, it does not give the Panel license to rewrite the PAs, which plainly state (multiple times) that all claims relating to SNF are assigned to PSEG. *See generally St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden*, 88 N.J. 571 (1982).

Moreover, ACE/Delmarva and, as importantly, the Board of Public Utilities, thought ACE/Delmarva was getting fair value for the facilities regardless of any takings claims. *See* PA at A108-A133. In explaining its findings, the Board of Public Utilities noted, in particular, the major risks that PSEG assumed under the PAs for the "operational risks of the units" which were "particularly significant" because the facilities "have historically experienced substantial performance and cost uncertainty," and also for "all of the responsibility and risk associated with unforeseen escalation in the cost of decommissioning of the plant." PA at A20. The amount of the liabilities assumed by PSEG under the PAs remains uncertain. It is also uncertain whether the takings theory under which the claims are being brought will prove to be viable and to what extent ACE/Delmarva would be able to show any significant loss as a minority owner. Fur-

ther, assuming the sellers were able to proceed with the takings claims, it is unclear whether and to what extent any takings damages would remain for the sellers in these cases after the buyer's contract claims were resolved. *See Boston Edison*, 64 Fed. Cl. at 187. Thus, the idea that recognition of ACE/Delmarva's assignment to PSEG of the takings claims is against the public interest is speculative and may also be exaggerated. It appears that ACE/Delmarva is asking this Panel to ignore the deal reached in the PAs and the Board of Public Utilities' findings and apply the medieval doctrine of the just price. We cannot do so, and, to the extent that the doctrine could possibly be applied here, *cf. In re Busy Beaver Bldg. Centers, Inc.*, 19 F.3d 833, 854 n.32 (3d Cir. 1994) ("[I]t is not the function of judges in fee litigation to determine the equivalent of the medieval just price.") (quoting *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992) (Posner, J.), it already has been applied by the Board of Public Utilities.

* * *

We find that ACE/Delmarva assigned the takings claims at issue here to PSEG, and that ACE/Delmarva's initiation of its takings litigation and its refusal to dismiss that litigation breached the PAs. Accordingly, PSEG's other claims regarding (1) ACE/Delmarva's failure to give notice of the takings claims; (2) ACE/Delmarva's failure to make efforts to assign the claims; and (3) assignment by ACE/Delmarva to PSEG of the proceeds of the ACE/Delmarva takings case are moot.

/s/ Michael Mukasey
C. Michael Loftus

Dated: June 20, 2007

SEPARATE OPINION OF JOHN D. ALDOCK

I respectfully dissent. In my opinion PSEG's more than three-year delay in bringing this arbitration was inexcusable and the more than $3.5 million in legal and expert fees and other company resources expended in litigating those claims over that period constituted substantial prejudice.[15] I would find that PSEG has forfeited its claim to arbitration through litigation conduct and laches.

ACE/Delmarva filed suit against the U.S. Government on January 14, 2005. PSEG issued its arbitration demand on April 5, 2007. While PSEG disputed ACE/Delmarva's right to bring its suit against the Government I believe it was incumbent on PSEG to do more.[16] I do not believe the burden was on ACE/Delmarva to initiate an arbitration solely to determine its right to litigate against the U.S. Government

Moreover, I find PSEG's letter of April 20, 2005 to counsel for ACE/Delmarva and the U.S. Government difficult to reconcile with its position in this arbitration. In that letter PSEG asked that Judge Miller be advised as follows: "PSEG Nuclear understands that

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[15] While PSEG speculates that ACE/Delmarva may have brought the Peach Bottom claim even if the other claims had been assigned, I do not believe hindsight speculation on that point removes the substantial prejudice ACE/Delmarva have incurred in litigating these claims against the U.S. Government for more than three years.

[16] I do not see PSEG's inaction during the period while its claim against the Government was dismissed as a justification for delay. Judge Miller clearly treated that dismissal as temporary and urged the parties to do the same. (*See* April 7, 2005 Hearing transcript at p. 23 attached to PSEG's prehearing brief.)

Delmarva is pursuing various legal theories, such as diminution in value, which PSEG Nuclear simply has no interest or desire to prosecute or defend. PSEG Nuclear is also opposed to consolidating its pending case, No. 01-551C (J. Futey), with the Delmarva case because the cases are in completely different procedural postures." (April 20, 2005 letter from Alex D. Tomaszczuk to Richard J. Conway and Harold D. Lester.)

PSEG apparently had no interest in the ACE/Delmarva claims against the Government until the Government conditioned settlement of PSEG's separate claims against the Government on settlement or extinguishment of the ACE/Delmarva claims (PSEG's Arbitration Demand at pp. 2 and 3). While this may in part explain PSEG's delay I do not believe it justifies it.[17]

Finally, I believe that Judge Miller, who has presided over the ACE/Delmarva litigation against the U.S. Government for more than three years, and who has pending a renewed motion for consolidation of the PSEG case against the Government, is in a better position than this panel to evaluate the waiver/laches/prejudice arguments. *See Ehleiter v. Grapetree Shares, Inc.*, 482 F.3d 207 (3d Cir. 2007).

/s/ John D. Alcock

Dated: June 20, 2007

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[17] Whether PSEG had no interest in the ACE/Delmarva claims because it believed them to be without merit, or because it could not benefit from claims that ACE/Delmarva was bringing on behalf of state rate payers is not material. PSEG clearly had no interest in the claims at issue here other than as a chip in its negotiations of its separate claims against the U.S. Government.

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
CHANCERY DIVISION – GENERAL EQUITY

[Filed Dec. 19, 2007]

Docket No. C-59-07

PSE&G POWER, LLC, and PSE&G NUCLEAR, LLC,
Plaintiffs,

v.

ATLANTIC CITY ELECTRIC CO. and
DELMARVA POWER and LIGHT CO.
Defendants.

ORDER

This matter having been opened to the Court by way of an Order to Show Cause seeking to confirm the arbitration award entered by the arbitration panel on June 20, 2007 pursuant to *N.J.S.A.* 2A:23B-22 filed by Plaintiffs; and opposition having been filed by Defendants; and the Court having reviewed the submissions of the parties; and having heard oral argument on November 13, 2007; and for the reasons set forth in the Statement of Reasons attached; and for good cause having been shown;

IT IS ON THIS 19th DAY OF DECEMBER, 2007,

ORDERED that the Order to Show Cause filed by Plaintiffs seeking to confirm the arbitration award rendered on June 20, 2007 pursuant to *N.J.S.A.* 2A:23B-22 is GRANTED and JUDGMENT is entered accordingly in favor of Plaintiffs.

/s/ Neil H. Shuster, P.J., Ch.

PSEG POWER, LLC and PSEG NUCLEAR, LLC

v.

ATLANTIC CITY ELECTRIC CO. and
DELMARVA POWER & LIGHT CO.

Docket No. C-59-07

PLAINTIFFS' REQUEST FOR THE ISSUANCE OF AN ORDER TO SHOW CAUSE SEEKING RELIEF BY WAY OF SUMMARY ACTION

This matter arises from a verified complaint and order to show cause to proceed summarily filed on June 25, 2007 by PSEG Power, LLC and PSEG Nuclear, LLC ("Plaintiffs") against Atlantic City Electric Company ("ACE") and Delmarva Power and Light Company ("Delmarva") (collectively "Defendants") seeking to confirm an arbitration award entered on June 20, 2007. On July 2, 2007, the Court signed Plaintiffs' order to show cause to proceed summarily to confirm the arbitration award. On July 11, 2007, Defendants filed a cross-motion to stay Plaintiffs' order to show cause pending the outcome of a motion by Defendants before the United States Court of Federal Claims ("Court of Federal Claims") to vacate the June 20, 2007 arbitration award. On July 24, 2007, Defendants filed an answer counterclaim and affirmative defenses. On August 20, 2007, this Court denied Defendants' motion for the entry of a stay of all proceedings in this matter. On August 30, 2007, the Court of Federal Claims denied Defendants' request to vacate the arbitration award, on the grounds that it lacked jurisdiction to entertain the issue. On September 18, 2007, this Court set oral

argument on Plaintiffs' order to show cause for October 15, 2007, later rescheduled to November 13, 2007. On November 13, 2007, the Court of Federal Claims granted summary judgment for the United States against Defendants on the issue of whether Defendants had takings claims they could bring against the United States. Oral argument on Plaintiffs' application seeking to confirm the arbitration award took place on November 13, 2007; however, the decision by the Court of Federal Claims issued on November 13, 2007 was not known to this Court or to the parties at the time of oral argument.

The facts reveal that Plaintiffs are the operator and sole owner of the Hope Creek Nuclear Generating Station ("Hope Creek") and the operator and majority owner of the Salem Nuclear Generating Station ("Salem") (collectively the "Stations"). On or around September 27, 1999, Plaintiffs purchased the minority interests of Defendants in those stations pursuant to purchase agreements (the "Agreements"). According to Plaintiffs, the Agreements provide that Defendants were to sell Plaintiffs their entire minority interests in the Stations[1] including all claims related to the assets being sold. Plaintiffs also assert that the Agreements give Plaintiffs the exclusive control over any litigation related to any of the assets being sold, as well as assigning to Plaintiffs the right of recovery associated with such litigation.

Specifically, Section 2.1 of the Agreements provides those assets to be transferred as a part of the sale of the Stations, and states, in pertinent part:

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[1] According to Plaintiffs, at the time of the sale, ACE owned 7.41% of Salem and 5% of Hope Creek and Delmarva owned 7.41% of Salem.

> Upon the terms and subject to the conditions set forth in this Agreement, at the Closing, Seller shall sell, assign, convey, transfer and deliver to Buyer, and Buyer shall purchase, assume and acquire from Seller . . . those assets listed below, each as in existence on the Closing Date (collectively the "Purchased Assets"):
>
> (l) All claims of Seller relating to or pertaining to the Department of Energy Standard Contract (including all claims for failure by the Department of Energy to take Spent Nuclear Fuel) accrued prior to, on or after the Closing Date, whether relating to periods prior to, on or after the Closing Date, and all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets. . .
>
> (m) The rights of Seller in, to and under all causes of action against third parties with respect to, arising out of or in connection with Seller's rights, title and interests in and to the Purchased Assets or the Assumed Liabilities, or any portion thereof, whether accruing prior to, on or after the Closing Date, other than any such causes of action as constitute Excluded Assets or Excluded Liabilities.

Additionally, Section 2.5 of the Agreements covers the control of litigation and provides that Plaintiffs "shall be entitled exclusively to control, defend and settle any suit, action or proceeding and any investigation arising out of or related to any Purchased Assets or Assumed Liabilities . . ." *See* Cert. of Christopher J. McAuliffe, Exh. A.

The Agreements also contain an arbitration clause and a provision stating the proper forum to hear any disputes arising out of the subject matter of the Agreements. Specifically, Section 8.3 of the Agreements, entitled "Arbitration," provides, in pertinent part:

> (a) Notwithstanding any provision hereof to the contrary, in the event of any dispute between Seller and Buyer arising after the Closing . . . and relating to or arising out of any provision of this Agreement . . . the sole remedy available to either Party is the dispute resolution process set forth in this Section 8.3.
>
> (b) The chief executive officers . . . of each of the Parties shall meet at a mutually acceptable time and place to attempt to settle any dispute in good faith.
>
> (c) In the event that (i) a meeting has been held in accordance with Section 8.3(b) and (ii) any such dispute of the kind referred to in Section 8.3(a) shall have not been resolved at such meeting, then, upon the written request of any Party, the Parties shall submit such dispute to binding arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association. The decision, judgment and order of the arbitration tribunal shall be final, binding and conclusive as to the Parties involved in such dispute, and their respective Representatives, and may be entered in [a] court of competent jurisdiction.

Section 10.10 of the Agreements provides some guidance as to the "court of competent jurisdiction." Specifically, it provides, in pertinent part:

> This Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey . . . as to all matters, including validity, construction, effect, performance and remedies. Venue in any and all suits, actions and proceedings related to the subject matter of this Agreement shall be in the state and federal courts located in and for the State of New Jersey (the "Courts") which shall have exclusive jurisdiction for such purpose, and the Parties hereby irrevocably submit to the exclusive jurisdiction of such Courts and irrevocably waive the defense of an inconvenient forum to the maintenance of any such suit, action or proceeding.

The current litigation arises out of separate actions filed by both Plaintiffs and Defendants against the Department of Energy ("DOE") in the Court of Federal Claims. In 1982, Congress passed the Nuclear Waste Policy Act which authorized the DOE to enter into contracts with utilities to accept title to, transport and dispose of spent nuclear fuel ("SNF"). The DOE subsequently created a standard contract that required it to commence acceptance of SNF no later than January 31, 1998 in exchange for a one time fee for SNF generated prior to 1983 and an ongoing fee assessed by the DOE for SNF generated thereafter. However, according to Plaintiffs, the DOE failed to meet its obligations to begin removing SNF and may not start this performance until the year 2017 at the earliest. Because of this delay, utilities that own and operate nuclear generating stations have been required to incur substantial costs for being forced to continue to store SNF. In this case, Plaintiffs entered into contracts with the DOE for the removal of SNF from the Stations. The DOE has

failed to do so, and in 2004, Plaintiffs filed suit against the United States for breach of contract in the Court of Federal Claims.

Defendants also filed claims against the United States in January 2004 seeking just compensation for the taking of private property by the federal government under the Takings Clause of the Fifth Amendment. The takings claims arose from the DOE's failure to remove SNF from the Stations which, at the time, were owned in part by Defendants. Defendants sought the losses they suffered prior to the sale of the Stations to Plaintiffs under the Agreements, which Defendants allege includes a substantially reduced sale price for the sold interests. The Court of Federal Claims initially denied the DOE's motion for summary judgment on Defendants' takings claim originally filed on April 28, 2005, and had granted another motion by Defendants seeking to subpoena documents from Plaintiffs. Plaintiffs have asked Defendants to dismiss their litigation because in Plaintiffs' suit against the DOE, the DOE stated that any recovery by Defendants in their litigation must directly offset any recovery by Plaintiffs in their litigation. The DOE also informed Plaintiffs that it will not settle its litigation with Plaintiffs without also resolving the claims advanced in Defendants' litigation. Because Defendants refused to dismiss their litigation, Plaintiffs triggered the dispute resolution procedures in Section 8.3. However, these procedures failed to resolve the dispute between the parties.

As a result, Plaintiffs subsequently filed an arbitration demand on April 5, 2007, essentially seeking a declaration that, under the Agreements, Defendants assigned to Plaintiffs all rights in the Purchased

Assets, including all claims related to the DOE's failure to remove SNF (including the takings claims), that Plaintiffs hold the right to control any litigation concerning the failure to remove SNF, and that Defendants are required to dismiss their litigation at Plaintiffs' request. In response, on April 16, 2007, Defendants filed their own separate arbitration demand. On April 23, 2007, Defendants filed an amended arbitration demand which sought to invalidate Plaintiffs' arbitration demand, a declaration that Plaintiffs' claims were not subject to arbitration, and a dismissal of Plaintiffs' arbitration claims.

On June 20, 2007, the arbitration panel in a 2-1 decision entered an award in favor of Plaintiffs. The majority opinion stated that the dispute was arbitrable, and held that the Agreements' comprehensive assignment language included the takings claims at issue; accordingly, Plaintiffs were assigned both the claims themselves and the right to control litigation over them. Additionally, it found that Defendants' refusal to dismiss their litigation against the United States in the Court of Federal Claims violated the Agreements. The separate opinion of Arbitrator John D. Aldock stated that Plaintiffs forfeited their claim to arbitration through litigation conduct and under the doctrine of laches, but additionally, that the Court of Federal Claims was in a better position to address these arguments. *See* Verified Complaint, Exh. 4. Pursuant to Section 10.10 of the Agreements, Plaintiffs then filed their verified complaint and order to show cause seeking the confirmation of the June 20, 2007 arbitration award on June 25, 2007.

On July 2, 2007, the same day that the Court signed Plaintiffs' order to show cause to proceed summarily to confirm the arbitration award, Defen-

dants filed a motion to vacate the arbitration ruling in the Court of Federal Claims. On July 11, 2007, Defendants filed a cross-motion in this Court to stay Plaintiffs' order to show cause pending the outcome of this motion to vacate the arbitration ruling. On July 24, 2007, Defendants filed an answer, counterclaim and affirmative defenses in response to Plaintiffs' verified complaint.

On August 20, 2007, this Court denied Defendants' motion for the entry of a stay of all proceedings in this matter. This Court denied the motion because it found that the Court of Federal Claims is not the appropriate jurisdiction to entertain Defendants' motion to vacate. This Court stated that the Court of Federal Claims has the power to only hear claims against the United States for monetary relief. This Court found instead that Defendants' motion to vacate should be heard as part of this state court proceeding. On August 30, 2007, the Court of Federal Claims found that it lacked jurisdiction to vacate an arbitration award. However, the Court of Federal Claims requested supplemental briefing on several issues in light of the United States' acceptance of Defendants' assignment of claims to Plaintiffs. The United States had filed a notice on August 22, 2007 stating that the Government had:

> accepted the assignment of those claims that [Defendants] purported to make to PSEG Nuclear, to the extent that we have been made aware of those claims through [Defendants'] complaint in this action and through the assignment provisions in the purchase and sale agreements that have been included in the appendices to some of the briefing in this case.

On November 13, 2007, the Court of Federal Claims ruled on Defendants' motion to vacate the June 20, 2007 arbitration award and on the United States' renewed motion for summary judgment. It reiterated that it would deny Defendants' motion to vacate the arbitration award because it lacked jurisdiction over disputes between private parties. Furthermore, and perhaps more importantly, it granted the United States' summary judgment motion against Defendants. Specifically, the Court of Federal Claims found that the United States had expressly consented to the assignment of claims from Defendants to Plaintiffs, and this acceptance vitiated the provisions of the Assignment of Claims Act that otherwise would have barred Defendants' assignment of claims against the United States to Plaintiffs. Therefore, because Defendants had assigned all of their claims against the United States related to the failure to remove SNF to Plaintiffs, the Court of Federal Claims granted summary judgment against Defendants in favor of the United States.

In the motion presently before the Court, Plaintiffs argue that the June 20, 2007 arbitration award should be confirmed because of New Jersey's strong public policy in support of arbitration as a method of resolving disputes. Additionally, Plaintiffs maintain that there is no evidence of any impropriety, wrongdoing, or significant mistakes in the arbitration process and order that would justify the correction, modification or vacation of the award. Defendants contend that the Court should not confirm the award because the award exceeded the arbitrators' powers, the arbitrators refused to consider pertinent evidence, and the arbitration concerned a question for which there was no agreement to arbitrate. Additionally, Defendants argue that the award exhibited a

manifest disregard of relevant law and therefore must be vacated.

The issue before the Court is whether to confirm the June 20, 2007 arbitration award. The Court will first discuss whether it is appropriate for Plaintiffs to have brought this action as a summary proceeding. *R.* 4:67-1 governs summary actions and provides that a summary action may be bought where the court is permitted by rule or by statute to proceed in a summary manner. *R.* 4:67-2 provides that those litigants proceeding summarily shall proceed by filing a verified complaint with an order to show cause.

Plaintiffs seek to move summarily under *N.J.S.A.* 2A:23B-22, entitled "Confirmation of Award," which provides:

> After a party to an arbitration proceeding receives notice of an award, the party may file a summary action with the court for an order confirming the award, at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to section 20 or 24 of this act or is vacated pursuant to section 23 of this act.

Hence, it is clear that Plaintiffs may bring this action as an order to show cause seeking to proceed summarily.

Next the Court must determine whether it should analyze the validity of the arbitration award under federal or state law. There is a strong federal policy in favor of arbitration and arbitrators' decisions. Congress enacted the Federal Arbitration Act ("FAA"), also known as the United States Arbitration Act, in 1925 to abrogate the then-existing common law rule disfavoring arbitration agreements "and to

place arbitration agreements upon the same footing as other contracts." *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 83-84 (2002) (quoting *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). Section 2 of the FAA provides that it applies to all contracts involving interstate commerce. *See* 9 U.S.C. 2. In enacting Section 2, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Martindale*, *supra*, at 84 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).

Section 10 of the FAA provides the grounds upon which a court may vacate an arbitration award:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made

See 9 U.S.C. 10.

Additionally, under federal law, as a matter of last resort, an arbitration award may be vacated if it evidences a manifest disregard for law. *St. John's*

Mercy Med. Ctr. v. Delfino, 414 F.3d 882, 884, 884 n.1 (8th Cir. 2005) (citing *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004)). It must be emphasized however that this doctrine is "extremely narrow," and should be reserved only for "those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent, but where none of the provisions of the FAA apply." *Ibid.* Put another way, a successful challenge to an arbitration award, apart from 9 U.S.C. 10, depends upon the challenger's ability to show that the award is "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact." *Advest. Inc. v. McCarthy*, 914 F.2d 6, 8-9 (1st Cir. 1990) (quoting *Local 1445, United Food and Commercial Workers v. Stop & Shop Cos.*, 776 F.2d 19, 21 (1st Cir. 1985)).

New Jersey shares this strong public policy favoring arbitration as a means to resolve disputes. It is a well-accepted principle that New Jersey supports the settlement of disputes by arbitration. *Singer v. Commodities Corp.*, 292 N.J. Super. 391, 400 (App. Div. 1996). *See also Stigliano v. Saint Rose High School*, 198 N.J. Super. 520, 529 (App. Div 1984) (stating that New Jersey courts have long favored the settlement of disputes by arbitration). Under the New Jersey Arbitration Act ("NJAA"), pursuant to *N.J.S.A.* 2A:23B-23(a), a court shall vacate an arbitration award under any of the following circumstances:

> (1) the award was procured by corruption, fraud, or other undue means;
>
> (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or mis-

conduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;

(4) an arbitrator exceeded the arbitrator's powers;

(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.

Usually, however, the FAA preempts state laws concerning arbitration agreements. It is firmly established that the FAA preempts state laws that invalidate arbitration agreements. *Martindale*, *supra*, at 85. *See also B & S Ltd. Inc. v. Elephant & Castle Int'l, Inc.*, 388 N.J. Super. 160, 172 (Ch. Div. 2006) (quoting *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 162 (2d Cir. 1998)) (stating that the "Supreme Court has declared that the FAA preempts all state laws that impermissibly burden arbitration agreements"). Nothing in the FAA indicates the broad principle of enforceability of arbitration agreements is subject to any additional limitations under state

law. *B & S Ltd*, *supra*, at 172 (citing *Southland Corp.*, *supra*, at 11).

However, the FAA's preemption does not completely encompass state laws. The FAA specifically permits states to regulate contracts, including contracts containing arbitration agreements under general contract principles; therefore, an arbitration clause may be invalidated upon such grounds as exist at law or in equity for the revocation of any contract. *Martindale*, *supra*, at 85. Nor does the FAA always preempt state laws. The FAA, while possessing some preemptive force, does not entirely displace state arbitration law, and will be found to be preemptive only when state law prevents parties from fully arbitrating their disputes. *Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 372 N.J. Super. 503, 508-09 (App. Div. 2004). *See also ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.*, 188 F.3d 307, 310 (5th Cir. 1999) (stating that the FAA does not preempt state arbitration rules as long as the state rules do not undermine the goals and policies of the FAA). The *Del Piano* court found that where New Jersey's conflict of interest statute was identical in its language to the conflict of interest provision of the FAA, New Jersey's statute could not be found to stand as an obstacle to the purposes of the FAA and thus be preempted by it. *Del Piano*, *supra*, at 509.

Similarly, the Court finds here that the language of Section 23 of the NJAA mirrors the language of Section 10 of the FAA. The first four grounds of vacation under the NJAA are nearly identical to those grounds listed under the FAA. The NJAA does list two additional grounds; however, the Court does not find that these last two grounds would "impermissibly burden arbitration agreements." Rather, the

first of these two grounds simply states an arbitration award cannot be confirmed when no arbitration agreement existed in the first place, and the second of the two grounds speaks to giving proper notice of initiating an arbitration proceeding and does not concern the substance of the arbitration agreement or proceeding. Therefore, the Court finds that the NJAA does not prevent the parties here from fully arbitrating their disputes, nor does it undermine the policies of the FAA which strongly support the resolution of disputes by arbitration.

Furthermore, in *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S 468 (1989), the United States Supreme Court was presented with a dispute over an arbitration agreement entered in to by the parties. The agreement contained a provision stating that all disputes "arising out of or relating to this contract or the breach thereof" were subject to arbitration. *Id.* at 470. The agreement also had a clause providing that "[t]he Contract shall be governed by the law of [California]." *Ibid.* At issue was whether application of the California Arbitration Act was preempted by the FAA in a case where the parties agreed that their arbitration agreement was governed by the laws of California.

The United States Supreme Court held that the California Arbitration Act was not preempted by the FAA in that matter. It found that the FAA does not prevent the enforcement of agreements to arbitrate under different rules than those set forth in the FAA itself where the parties agreed to abide by state rules of arbitration. *Id.* at 479. The Court declared that were this not the case, the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms would be frus-

trated. *Ibid.* Rather, arbitration under the FAA is a matter of consent, not coercion, and parties should be generally free to structure their arbitration agreements as they see fit. *Ibid.*

In this matter, Section 10.10 of the Agreements provides that they will be "governed by and construed in accordance with the laws of the State of New Jersey (without giving effect to conflicts of law principles) as to all matters, including validity, construction, effect, performance and remedies." Therefore, because the parties have agreed to resolve their disputes under New Jersey law, the Court shall apply the NJAA to the facts of this case in determining whether the June 20, 2007 arbitration award should be confirmed.

Finally, the Court must determine whether to confirm the June 20, 2007 arbitration award pursuant to the NJAA. Defendants' primary contentions raised in support of their position that the arbitration award must be vacated are that (1) the Assignment of Claims Act was not complied with, and (2) numerous cases stand for the proposition that a private party cannot assign or transfer a takings claim against the United States to another private party. The Assignment of Claims Act, 31 U.S.C. 3727 (formerly 31 U.S.C. 203), provides that an assignment of any part of a claim against the United States Government or of an interest in the claim may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. Defendants contend that these requirements have not been satisfied by the parties in this matter.

Defendants also state that case law is clear in holding that private parties cannot by mutual agreement assign takings claims against the United

States. Defendants cite to *Dow v. United States*, 357 U.S. 17 (1958) which states that the Assignment of Claims Act prohibits the voluntary assignment of a compensation claim against the Government for the taking of property and that the owner of the property at the time of the taking, not the owner at an earlier or later date, receives the payment. *Id.* at 20-21. Additionally, the Government has an obligation to provide just compensation for takings. *Id.* at 24. Defendants cite to *Argent v. United States*, 124 F.3d 1277 (Fed. Cir. 1997) which states that absent a valid voluntary assignment of a compensation claim against the Government for the taking of property, the general rule is that the owner at the time of the taking is the party who has the claim and is to receive payment. *Id.* at 1287. Defendants additionally cite to *Rochester Gas & Electric Corp. v. United States*, 65 Fed. Cl. 431 (2005) as a case that is "on all fours with" the present matter. In *Rochester Gas*, the plaintiff sold its nuclear plant to a third party and executed a contract with the third party which assigned its takings claims, related to the DOE's failure to remove SNF, to the third party. The United States challenged this assignment under the Assignment of Claims Act. The *Rochester Gas* court held that the plaintiff could not assign its takings claims to the third party. *Id.* at 441. It stated that a party must own the property at the time that the alleged taking occurred in order for it to be able to allege that its property right had been taken. *Ibid.* Defendants thus conclude that these cases affirm that, under the Assignment of Claims Act, the assignment of takings claims against the Government to a third party is absolutely null and void unless certain requirements, none of which were met here, are satisfied.

Based on these contentions, Defendants have made four arguments pursuant to state and federal arbitration law in asserting that the June 20, 2007 arbitration award must be vacated. First, Defendants contend that the arbitrators exceeded their powers by depriving Defendants of their fundamental constitutional right to just compensation. *See N.J.S.A.* 2A:23B-23(a)(4). Second, Defendants argue that the arbitrators failed to consider evidence which prejudiced the rights of Defendants. *See N.J.S.A.* 2A:23B-23(a)(3). Third, Defendants maintain that the arbitration clause of the Agreements is not applicable to Defendants' takings claims because the claims do not arise under the Agreements, but rather under the Fifth Amendment of the United States Constitution. *See N.J.S.A.* 2A:23B-23(a)(5). Finally, Defendants argue that the arbitrators acted in manifest disregard of the law by disregarding the above mentioned case law.

In addressing these arguments, the Court first discusses the general purview of the review of arbitration awards by New Jersey courts. Notwithstanding the apparently broad scope of a court's powers to alter an arbitrator's award as described in the statutory language, our courts have not traditionally interpreted the statutory language broadly. *Kimm v. Blisset, LLC*, 388 N.J. Super. 14, 29-30 (App. Div. 2006), *cert. den.*, 189 N.J. 428 (2007) (*citing Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc.*, 135 N.J. 349, 355 (1994)). Arbitration is a favored remedy in New Jersey, *Faherty v. Faherty*, 97 N.J. 99, 105 (1984), and a strong judicial presumption exists in favor of the validity of an arbitration award. *Del Piano, supra*, at 510. Thus, it is rather difficult for a party to successfully move a New Jersey court to amend or vacate an arbitration award. With this in

mind, the Court now addresses each of Defendants' arguments in turn.

1. *Did the Arbitrators Exceed Their Powers?*

Defendants argue that the arbitrators exceeded their powers, pursuant to *N.J.S.A.* 2A:23B-23(a)(4) because the arbitrators decided a constitutional issue incorrectly. Defendants argue that the arbitration panel ignored three different rules: (1) that when the Government takes property, it must pay for it; (2) that only the owner of property at the time of the taking is entitled to recover from the Government; and (3) that if the assignment is to an assignee who can't bring the claim against the United States, the claim reverts back to the assignor. Defendants assert that because the arbitration panel assigned Defendants' takings claims to Plaintiffs who, as the subsequent owners of the minority interests, are not entitled to bring those claims, the takings claims are in effect extinguished and the United States no longer is obligated to pay just compensation for these takings. Defendants also claim that this ruling has deprived them of their fundamental right to just compensation. Defendants conclude that because this is in contravention of the law that prohibits the forfeiture of takings claims, the arbitrators exceeded their powers, and therefore the arbitration award should be vacated.

Plaintiffs respond that the arbitration panel's authority is derived from the Agreements. Therefore, the arbitrators could have only exceeded their powers if they decided an issue that was outside the scope of the Agreements. Plaintiffs argue that the arbitrators did not decide a constitutional issue as Defendants allege, but rather decided a contractual issue based on the language of the Agreements. Plaintiffs main-

tain that because the Agreements establish that any dispute regarding the assignment of Defendants' takings claims is covered under the arbitration clause's broad scope in Section 8.3(a), the arbitrators did not step outside the bounds of their authority and thus did not exceed their powers.

An arbitrator's authority to resolve a dispute is based upon the contract between the parties. *High Voltage Eng'g Corp. v. Pride Solvents & Chemical Co. of New Jersey, Inc.*, 326 N.J. Super. 356, 361-62 (App. Div. 1999) (citing *Communications Workers of America, Local 1087 v. Monmouth County Bd. of Soc. Servs.*, 96 N.J. 442, 448 (1984)). Thus, the jurisdiction and authority of the arbitrator are circumscribed by and limited to the powers delegated to him. *Communications Workers, supra*, at 448. If an arbitrator ignores the limited authority that the contract confers, the arbitrator has exceeded his powers and the court may not defer to the arbitrator's decision. *Zervos v. Freedman Properties*, 223 N.J. Super. 599, 603 (Ch. Div. 1987) (citing *County College of Morris Staff Ass'n v. County College of Morris*, 100 N.J. 383, 391 (1985)). Therefore, in determining whether the arbitration panel had the authority to resolve the dispute as to the transfer of the takings claims from Defendants to Plaintiffs, the Court must look to the language of the Agreements.

The Court finds that it is clear that the arbitration panel had the power and authority to rule on whether the takings claims had been assigned to Plaintiffs. Section 2.1(l) of the Agreements states that the Purchased Assets include any of Defendants' claims relating to the failure of the DOE to remove SNF from the Stations. Section 2.1(m) provides that the Purchased Assets also include all of Defendants'

rights under any cause of action against third parties related to their former interests in the Stations. Thus, the dispute here over whether Defendants' takings claims were assigned to Plaintiffs is based on the language of Section 2.1(l) and Section 2.1(m). Section 8.3 of the Agreements provides that any dispute related to any provision in the Agreements is subject to arbitration. Because this dispute is based on Sections 2.1(l) and (m), it is subject to arbitration under Section 8.3.

Moreover, the Court finds that Defendants' argument that the arbitration panel's ruling will relieve the United States from its obligation to pay just compensation for its taking is irrelevant towards determining the scope of the arbitration clause in the Agreements. The arbitration panel's function was not to determine the ultimate result from the assignment of Defendants' claims, but whether Defendants' takings claims were in fact transferred to Plaintiffs as part of the Purchased Assets under the Agreements. Nor did the arbitration panel decide what would become of Defendants' assigned takings claims; rather it simply found that the Agreements' assignment language included Defendants' takings claims and that the Assignment of Claims Act did not act as an absolute prohibition of Defendants' assignment of their takings claims to Plaintiffs. Therefore, the Court finds that the arbitrators have not exceeded their powers here.

2. Did the Arbitrators Fail to Consider Evidence?

Defendants next argue, pursuant to *N.J.S.A.* 2A:23B-23(a)(3), that the arbitrators failed to consider evidence related to the potential value of their takings claims against the United States. The arbi-

tration panel addressed the viability of Defendants' claims by stating:

> It is also uncertain whether the takings theory under which the claims are being brought will prove to be viable and to what extent ACE/ Delmarva would be able to show any significant loss as a minority owner. Further assuming the sellers were able to proceed with the takings claims, it is unclear whether and to what extent any takings damages would remain for the sellers in these cases after the buyer's contract claims were resolved. *See Boston Edison*, 64 Fed. Cl. at 187. Thus, the idea that recognition of ACE/Delmarva's assignment to PSEG of the takings claims is against the public interest is speculative and may also be exaggerated.

Arb. Opinion, pp. 23-24.

Defendants contend that this assertion is entirely inappropriate and should not be a basis to justify the extinguishment of Defendants' takings claims. Defendants claim that these statements demonstrate that the arbitrators failed to consider the "undisputed evidence" indicating that Defendants' claims are viable and valuable, and thereby prejudiced Defendants and the New Jersey customers on whose behalf Defendants' takings claims are being pursued. Defendants point to the evidence that there is a long-standing basis for takings claims of this nature, that Defendants' claims have already withstood a summary judgment motion by the United States,[2] and

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[2] This point, however, is now mooted after the Court of Federal Claims granted the United States' most recent motion for summary judgment on November 13, 2007, as mentioned *supra*.

that substantially identical claims in a recent case withstood all motions to invalidate them. In *Boston Edison Co., v. United States*, 64 Fed. Cl. 167 (2005), the Court of Federal Claims denied the government's motion for summary judgment against the plaintiff, and according to Defendants, the trial has recently concluded with asserted damages of over $100 million. *See* Cert. of Nicholas Mattia, ¶10. Defendants have retained the same expert used in the *Boston Edison Co.* case, and this expert has proffered that Defendants' claims may be worth $70-80 million. *See ibid.* Therefore, by ignoring the evidence demonstrating that Defendants' takings Claims have merit to them, Defendants' argue that they have been substantially prejudiced by the arbitrators.

Defendants also argue that the arbitration panel failed to consider the aforementioned litany of cases that Defendants cited to in support of their position that the only party able to bring a takings claim against the Government is the owner of the property at the time of the taking, and any attempt to assign such a claim to a third party is invalid. Defendants state that the arbitrators made absolutely no reference to *Dow*, *supra*, or *Argent*, *supra*, and only referred to *Rochester Gas*, *supra*, as support for an unrelated proposition despite the fact that these were the cases that Defendants primarily relied on. Therefore, Defendants contend that the arbitration panel failed to consider the propositions that these cases stand for and were thereby prejudiced. Defendants argue that the arbitration panel should have distinguished these opinions in order to demonstrate that the panel considered this evidence.

Plaintiffs respond that just because a judge has allowed a takings claim in another case to make it to

trial does not establish the validity of Defendants' takings claims in their case against the United States in the Court of Federal Claims. Plaintiffs contend that arbitration awards have only been vacated on this basis when the arbitrators haven't allowed evidence to be entered or presented, not when the arbitrators have found evidence to simply be not compelling. Moreover, Plaintiffs state that this evidence is not material to the underlying issue of whether Defendants assigned their takings Claims to Plaintiffs when the parties executed the Agreements. Finally, Plaintiffs argue that the arbitration panel did not have to address this litany of cases because, contrary to Defendants' assertions, no case exists which states that a takings claim cannot be assigned between private parties. Therefore, Plaintiffs argue that the arbitration panel did not fail to consider material evidence in making its decision.

The Court finds that this evidence that the arbitration panel allegedly failed to consider was not material to the controversy at issue, i.e., whether Defendants assigned their takings claims to Plaintiffs pursuant to the Agreements. The arbitration panel addressed the viability of Defendants' taking claims in support of its finding that Defendants felt they were getting a fair value for their minority interests in the Stations regardless of any takings claims. This finding contradicts Defendants' belief that Plaintiffs would be receiving a windfall if the arbitration panel found that the takings claims had been assigned, because (1) the viability of the takings claims is uncertain, and (2) the amount of liabilities assumed by Plaintiffs from Defendants remains uncertain. But the arbitration panel stated that "[w]hatever rhetorical force this argument may have, it does not give the Panel license to rewrite the [Agreements],

which plainly state (multiple times) that all claims relating to SNF are assigned to PSEG." Arb. Opinion at 23. Therefore, the Court finds that the arbitration panel based its decision on the language of the Agreements, and not the issue of viability of the takings claims. Thus, the evidence that the arbitration panel purportedly failed to consider was immaterial to its finding that pursuant to the Agreements, the takings claims were assigned.

Moreover, the Court finds that the arbitration panel need not have cited to the litany of cases presented to it by Defendants because the arbitration panel recognized that only the United States could invoke the Assignment of Claims Act as a defense, and that the United States had the authority to consent to an assignment of takings claims. Defendants allege that *Dow*, *supra*, *Argent*, *supra*, and *Rochester Gas*, *supra*, all affirm that under the Assignment of Claims Act, the assignment of takings claims against the Government to a third party is "absolutely null and void" unless certain specific requirements are met. However, the arbitration panel rejected this alleged proposition by stating that the Government could consent to an assignment of a claim that would otherwise violate the Assignment of Claims Act, *see Vt. Yankee Nuclear Power Corp. v. United States*, 73 Fed. Cl. 236, 240 (2006), and that only the United States could invoke the Assignment of Claims Act to void the assignment. *See United States v. Certain Space in Property Known as Chimes Bldg.*, 320 F Supp. 491, 496 (N.D.N.Y. 1969), *aff'd*, 435 F.2d 872 (2d Cir. 1970). Furthermore, the arbitration panel stated that Defendants' contention that they could not have assigned the takings claims at issue rang hollow, and that Defendants failed to cite to any cases in which the Assignment of Claims Act has

been used to invalidate an assignment as between private parties. The Court thereby finds that the arbitration panel did consider the cases cited by Defendants, but simply found that none of them prohibited the assignment of Defendants' takings claims at issue here. Therefore, the Court finds that Defendants' second argument that the arbitration panel failed to consider evidence must fail.

3. Is the Arbitration Clause Applicable to Defendants' Takings Claims?

Third, Defendants argue, pursuant to *N.J.S.A.* 2A:23B-23(a)(5), that the arbitration clause in the Agreements does not apply to Defendants' takings claims. Defendants state that Section 8.3 of the Agreements provides that any dispute relating to or arising out of any provision of this Agreement is subject to arbitration. However, Defendants argue that their takings claims do not arise out of the Agreements, but rather under the Fifth Amendment of the United States Constitution. Therefore, Defendants conclude that there was no agreement to arbitrate the assignment of their takings claims and thus the arbitration panel was without jurisdiction in making the arbitration award. Defendants additionally argue that because under the Assignment of Claims Act, the assignment of claims against the United States is rarely permitted in circumstances not relevant here, there could be no agreement to arbitrate the assignment of Defendants' takings claims here.

Plaintiffs respond that this argument invokes the same issues that Defendants raised in their argument that the arbitrators exceeded their powers because the Court, in resolving the issue, must determine the scope of the arbitration clause. Plaintiffs

again state that the language of the arbitration clause is clear in granting the arbitration panel jurisdiction over whether Defendants assigned their takings claims to Plaintiffs.

The Court finds that Defendants' arguments here are unpersuasive. The Court agrees that Defendants' takings claims against the United States do arise under the Fifth Amendment of the United States Constitution. However, the dispute between Defendants and Plaintiffs does not regard the merits of Defendants' takings claims against the United States. Rather, the dispute arises from whether, by executing the Agreements, Defendants assigned their takings claims to Plaintiffs as part of the Purchased Assets. This dispute thereby clearly arises from Section 2.1 of the Agreements which discusses which assets Plaintiffs are receiving. Therefore, the Court finds that there is an agreement to arbitrate whether Defendants' takings claims have been assigned to Plaintiffs.

Moreover, Defendants' argument under the Assignment of Claims Act does not change the fact that the arbitration clause in Section 8.3 applies to the dispute in this matter. The parties are both sophisticated, and were free to contract to any terms in the Agreements to their satisfaction. As the Court has already stated, the Assignment of Claims Act does not place an absolute prohibition on an assignment of takings claims against the United States from one party to another; the United States may choose to consent to such an assignment. Therefore, the Court finds that the arbitration clause in Section 8.3 is applicable to the assignment of Defendants' takings claims.

4. *Did the Arbitrators Act in Manifest Disregard of the Law?*

Finally, Defendants argue that the arbitrators acted in manifest disregard of the law. The Court first finds that it need not address this argument in light of its decision to apply the NJAA to this matter. It is clear to the Court that New Jersey law does not recognize "manifest disregard of the law" as a basis for vacation of an arbitration award. The Court first notes that the NJAA does not list "manifest disregard of the law" or other similar language as a reason under which an arbitration award can be vacated. *See N.J.S.A.* 2A:23B-23. Moreover, case law interpreting the former statute governing the vacation of an arbitration award, *N.J.S.A.* 2A:24-8 (nearly identical to the first four subsections of *N.J.S.A.* 2A:23B-23(a)), has held that a mistake of law is not a ground for the vacation of an arbitration award. In *Tretina v. Fitzpatrick & Assocs.*, 135 N.J. 349 (1994), the New Jersey Supreme Court discussed the previously existing standard under which a court could vacate an arbitration award whenever an arbitrator's award "embraced egregious mistakes of law." *See Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 129 N.J. 479, 496 (1992). However, the *Tretina* court rejected this standard and adopted the standard articulated by Chief Justice Wilentz in his concurring opinion in *Perini Corp.*, *supra*, which held that arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators, and can be corrected or modified only for very specifically defined mistakes.[3] *Tretina*, *supra*, at 358.

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[3] These mistakes are defined at *N.J.S.A.* 2A:24-9 as cited in *Tretina*, *supra*, and now pursuant to the NJAA at *N.J.S.A* 2A:23-20 and are not applicable to the present matter.

Thus, a mistake of law provides no basis for the vacation of an arbitration award. *See Cap City Products, Co. v. Louriero*, 332 *N.J. Super.* 499, 504 (App. Div. 2000). Therefore, the Court finds that Defendants are not entitled to seek vacation of the June 20, 2007 arbitration award on the alleged basis that the arbitrators acted in manifest disregard of the law.

Even were the Court to address Defendants' contention that the arbitrators acted in manifest disregard of the law, the Court would find that no support exists here for that position. Defendants argue that *Rochester Gas*, *supra*, is "on all fours" with the situation at issue here. However, in *Rochester Gas*, *supra*, the United States was the party who challenged this assignment under the Assignment of Claims Act. Here the Defendants are attempting to invoke the Assignment of Claims Act in barring the assignment of their takings claims to Plaintiffs. As discussed, *supra*, only the United States may invoke the Act as a defense to an assignment of claims against it. *See, e.g.*, *United States v. Aetna Gas. & Sur. Co.*, 338 U.S. 366, 371 (1949); *Martin v. National Sur. Co.*, 300 U.S. 588, 594 (1937). Moreover, the United States has expressly accepted the assignment of Defendants' takings claims to Plaintiffs, something it has the right to recognize. *See Tuftco Corp. v. United States*, 614 F.2d 740, 745 (Fed. Cl. 1980). Therefore, although the facts underlying the takings claims here may be similar to those facts in *Rochester Gas*, the fact that the United States has consented to the assignment here rather than attacked its validity distinguishes the situation here from that in *Rochester Gas*.

Moreover, the Court finds that the other cases cited by Defendants which are allegedly manifestly ignored by the arbitration panel do not support Defendants'

position. Defendants contend that *Dow*, *supra*, stands for the proposition that any attempt to assign a takings Claim against the United States to a third party is invalid. Although this may be generally true, Defendants' reliance on *Dow* ignores the above mentioned precedent stating that the United States may consent to an assignment even if it doesn't comply with the requirements of the Assignment of Claims Act. Defendants' reliance on *Argent*, *supra*, and *United States v. Shannon*, 342 U.S. 288 (1952) is also misguided. These cases have held that absent a valid voluntary assignment of a compensation claim against the Government for the taking of property, the general rule is that the owner at the time of the taking is the party who has the claim and is to receive payment. These cases do not preclude the Government from recognizing assignment of takings claims and thereby removing the absence of a valid voluntary assignment. Therefore, it certainly cannot be said that this is one of those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent.

The Court thereby finds that all of Defendants' arguments in support of their position that the June 20, 2007 arbitration award should be vacated must be rejected. Therefore, the Court will confirm the June 20, 2007 arbitration award in this matter.

For the above stated reasons, Plaintiffs' request to confirm the June 20, 2007 arbitration award is GRANTED.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

[Filed October 6, 2008]

Docket No. A-002559-07T3

PSEG POWER

vs.

ATLANTIC CITY ELECTRIC

ORDER DISMISSING APPEAL

This matter being opened to the Court on its own motion and it appearing from the attached that the appellant has requested that the appeal be withdrawn;

It is HEREBY ORDERED that the above appeal is dismissed.

WITNESS, the Honorable Edwin H. Stern, Presiding Judge for Administration, at Trenton, this 06 day of October, 2008.

/s/ John M. Chacko
John M. Chacko
Clerk of the Appellate Division

APPENDIX D

PSE&G CONTRACT NO. 83-6-ND-684
U.S. DEPARTMENT OF ENERGY
CONTRACT NO. DE-CR01-83NE44480
SALEM GENERATING STATION
NOS. 1 AND 2 UNITS

CONTRACT FOR DISPOSAL OF SPENT NUCLEAR FUEL AND/OR HIGH-LEVEL RADIOACTIVE WASTE

THIS CONTRACT, entered into this 13th day of June 1983, by and between the UNITED STATES OF AMERICA (hereinafter referred to as the "Government"), represented by the UNITED STATES DEPARTMENT OF ENERGY (hereafter referred to as "DOE") and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, (hereinafter referred to as the "Purchaser"), a corporation organized and existing under the laws of the State of New Jersey, acting on its own behalf as managing utility for Salem Generating Station, Nos. 1 and 2 Units and on behalf of the joint owners, Philadelphia Electric Company, Atlantic City Electric Company, and Delmarva Power and Light Company.

* * * *

PSE&G CONTRACT NO. 83-6-ND-684
U.S. DEPARTMENT OF ENERGY
CONTRACT NO. DE-CR01-83NE44480
SALEM GENERATING STATION
NOS. 1 AND 2 UNITS

CONTRACT FOR DISPOSAL OF SPENT NUCLEAR FUEL AND/OR HIGH-LEVEL RADIOACTIVE WASTE

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* * * *

APPENDIX E

(DP&L-SALEM)

PURCHASE AGREEMENT

BY AND BETWEEN

DELMARVA POWER & LIGHT COMPANY

and

PSEG POWER LLC

Dated as of September 27, 1999

* * * *

ARTICLE II

PURCHASE AND SALE

2.1 Transfer of Purchased Assets. Upon the terms and subject to the conditions set forth in this Agreement, at the Closing. Seller shall sell, assign, convey, transfer and deliver to Buyer, and Buyer shall purchase, assume and acquire from Seller, free and clear of all Encumbrances, except for the Permitted Encumbrances, all of Seller's rights, title and interests, of whatever kind and nature, whether tangible or intangible, in and to all assets (except for the Excluded Assets) constituting or used and necessary for the operation of the Salem Station or any portion thereof, together with all goodwill relating thereto, including, without limitation, those assets listed below, each as in existence on the Closing Date (collectively, the "Purchased Assets"):

(a) The Real Property;

(b) The Inventories;

(c) The Nuclear Materials held pursuant to the NRC Licenses;

(d) The Fuel Supplies;

(e) All machinery (mobile or otherwise), equipment (including computer hardware and software and communications equipment), vehicles, tools, spare parts, fixtures, furniture, furnishings and other personal property located at or in transit to the Salem Station or used and necessary for the operation of the Salem Station, in each case, on the Closing Date (collectively, the "Tangible Personal Property"), including the electrical transmission assets (as opposed to generation assets) set forth in Schedule 2.1(e);

(f) Subject to the receipt of necessary consents and approvals, the Seller's Agreements;

(g) Subject to the receipt of necessary consents and approvals, the Transferable Permits and all of Seller's rights, title and interests in and to any other permits, registrations, franchises, certificates, licenses and other authorizations, consents and approvals of Governmental Authorities relating to the ownership, lease, maintenance or operation of the Salem Station or any portion thereof;

(h) Seller's Nonqualified Decommissioning Funds as of the Closing Date, including all income, interest and other earnings accrued thereon, together with all required accounting and other records;

(i) Seller's Qualified Decommissioning Funds as of the Closing Date, including all income, interest and other earnings accrued thereon, together with all required accounting and other records;

(j) All books, operating records, operating, safety and maintenance manuals, engineering design plans, blueprints and as-built plans, specifications, proce-

dures and similar items of Seller relating specifically to the Salem Station (subject to the right of Seller to retain copies of same for its use) other than such items which are proprietary to third parties and accounting records;

(k) All unexpired, transferable warranties and guarantees from third parties arising out of, in respect of, or in connection with, (i) any item of Real Property or personal property, or interest therein, included in the Purchased Assets or

(ii) the Assumed Liabilities;

(l) All claims of Seller relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract (including all claims for failure by the Department of Energy to take Spent Nuclear Fuel) accrued prior to, on or after the Closing Date, whether relating to periods prior to, on or after the Closing Date, and all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets, other than the claims described in Section 2.2(1); and

(m) The rights of Seller in, to and under all causes of action against third parties with respect to, arising out of or in connection with Seller's rights, title and interests in and to the Purchased Assets or the Assumed Liabilities, or any portion thereof, whether accruing prior to, on or after the Closing Date, other than any such causes of action as constitute Excluded Assets or Excluded Liabilities whether received as payment or credit against future liabilities, in each case, relating to any period prior to, on or after the Closing Date, other than the claims described in Section 2.2(m).

2.2 Excluded Assets. Notwithstanding anything to the contrary in this Agreement, nothing in this Agreement shall constitute or be construed as requiring Seller to sell, assign, convey, transfer or deliver, and Buyer shall not be entitled to purchase or acquire, any right, title or interest in, to or under the following assets and properties which are associated with the Purchased Assets, but which are hereby specifically excluded from the definition of Purchased Assets (collectively, the "Excluded Assets"):

(a) The right, title and interest of Seller in, to and under all electrical transmission or distribution assets (as opposed to generation assets) located at or forming part of the Salem Station (whether or not regarded as a "transmission" or "generation" asset for regulatory or accounting purposes), including all switchyard facilities, substation facilities and support equipment, as well as all permits, contracts (including the LDV Agreement) and warranties, to the extent they relate to such transmission and distribution assets (other than the electrical transmission assets identified in Schedule 2.1(e) included as Purchased Assets) (collectively, the "Transmission Assets");

(b) The right, title and interest of Seller in, to and under certain switches and meters, gas facilities, revenue meters and remote testing units, drainage pipes and systems, pumping equipment and associated piping, in each case, located at or forming part of the Salem Station as identified in Schedule 2.2(b) attached hereto;

(c) All certificates of deposit, shares of stock, securities, bonds, debentures, evidences of indebtedness, and interests in joint ventures, partnerships, limited liability companies and other entities, including account balances under Seller's Insurance

Policies and the right, title and interest of Seller in, to and under account balances held by NEIL under Buyer's insurance Policies, but excluding such assets comprising the Decommissioning Funds;

(d) All Seller's Insurance Policies and the right, title and interest of Seller in, to and under account balances held by NEIL under Buyer's Insurance Policies;

(e) All cash, cash equivalents, bank deposits, accounts and notes receivable (trade or otherwise), and prepaid expenses, including premiums and account balances under Seller's Insurance Policies and the right, title and interest of Seller in, to and under account balances held by NEIL under Buyer's Insurance Policies, and any income, sales, payroll or other Tax receivables (in each case, whether held by Seller or any third party, including Buyer under the Owners Agreement), but excluding such assets comprising the Decommissioning Funds;

(f) The right, title and interest of Seller in, to and under all intellectual property, including the names "Delmarva Power & Light Company", "DP&L" or any derivation thereof, as well as any related or similar name, or any other trade names, trademarks, service marks, corporate names and logos, or any part, derivation, colorable imitation or combination thereof;

(g) All tariffs, agreements and arrangements with Persons other than Buyer to which Seller is a party for the purchase or sale of electric capacity or energy, or for the purchase of transmission, distribution or ancillary services;

(h) Other than with respect to the Decommissioning Funds, all Tax refunds or credits (including refunds or credits of real property Taxes paid or due

with respect to the Salem Station or any related Real Property), which refunds or credits are owed to Seller with respect to periods prior to the Closing Date, whether directly or indirectly, under the Owners Agreement or otherwise regardless of when actually paid (which refunds or credits shall be net to Seller of all reasonable out-of-pocket costs and expenses (including legal fees) incurred by Buyer in connection with obtaining the portion of such Tax refund or credit owed to Seller);

(i) The minute books, stock transfer books, corporate seal and other corporate records of Seller;

(j) The right, title and interest of Seller in, to and under all contracts, agreements, arrangements, licenses and leases of any nature, other than the Seller's Agreements;

(k) All other assets and properties owned or leased by Seller which are not used and necessary for the operation of the Salem Station or any portion thereof;

(l) All claims of Seller relating to or pertaining to any refund or credit received on or after the Closing Date by Buyer or its successors or permitted assigns of all or any part of Department of Energy Decommissioning and Decontamination Fees for which Seller is or was liable; provided that Seller shall not have any right to pursue such claims separately, but shall be entitled to pursue such claims solely by joint action with Buyer and any other interested parties approved by Buyer, such action to be controlled by Buyer in its sole discretion; provided, also, that if Buyer shall receive any such refund or credit on or after the Closing Date of all or any part of such Department of Energy Decommissioning and Deconta-

mination Fees, Seller's claim to a portion of such refund shall be limited to the amount of such refund or credit multiplied by a fraction, (i) the numerator of which is the amount of Decommissioning and Decontamination Fees with respect to the Salem Station paid by Seller or on Seller's behalf, and (ii) the denominator of which is the amount of Decommissioning and Decontamination Fees with respect to the Salem Station paid by all of the parties to the Owners Agreement or on their behalf; and provided, further, that the aforesaid claims shall constitute Excluded Assets (rather than Purchased Assets) after the Closing only if Seller shall continue to pay after the Closing its proportionate share of the costs and expenses (including reasonable legal fees) of pursuing any such claims (but not Department of Energy Decommissioning and Decontamination Fees), such proportionate share to be determined as if Seller had not transferred its rights, title and interests in and to the Purchased Assets to Buyer;

(m) All rights of Seller in, to and under the action against Westinghouse Electric Corporation or its Affiliates, or their respective successors or assigns, captioned *Public Service Electric & Gas Company, et al. v. Westinghouse Electric Corporation*, C.A. No. 96-925 (MTB) in the United States District Court for the District of New Jersey. and all related actions currently pending in state courts; provided that the aforesaid claims shall constitute Excluded Assets (rather than Purchased Assets) after the Closing only if Seller shall continue to pay after the Closing its proportionate share of the costs and expenses (including reasonable legal fees) of pursuing any such claims, such proportionate share to be determined as if Seller had not transferred its rights, title and interests in and to the Purchased Assets to Buyer; and

(n) The right, title and interest of Seller in. to and under this Agreement, the Collateral Agreement and the Additional Agreements.

2.3 Assumed Liabilities. At the Closing, Buyer shall assume and agree to pay, perform and otherwise discharge, without recourse to Seller (other than as set forth herein or in the Owners Agreement, as amended by the Amendment to Owners Agreement), in accordance with the terms and subject to the conditions set forth herein, all of the liabilities and obligations of Seller, direct or indirect, known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, which relate to the Purchased Assets (other than Excluded Liabilities) (the "Assumed Liabilities"), including those set forth below; provided that nothing set forth in this Section 2.3 shall require Buyer to assume any liabilities or obligations that are expressly excluded pursuant to Section 2.4:

* * * *

(f) All liabilities and obligations of Seller in respect of Spent Nuclear Fuel, including Spent Nuclear Fuel Fees, whether such liability or obligation is known or unknown, contingent or accrued, and whether arising or occurring prior to, on or after the Closing Date, except as specified in Section 2.6 (collectively, "Assumed Spent Fuel Liabilities") . . . .

* * * *

2.5 Control of Litigation.

(a) The Parties acknowledge and agree that, from and after the Closing Date, Seller shall be entitled exclusively to control, defend and settle any suit, action or proceeding, and any investigation arising out of or related to any Excluded Assets or Excluded Lia-

bilities, so long as such control, defense or settlement does not unreasonably interfere with Buyer's operation of the Salem Station; and Buyer agrees to cooperate fully in connection therewith, provided, however, that Seller shall reimburse Buyer for all reasonable costs and expenses incurred in providing such cooperation.

(b) The Parties acknowledge and agree that, from and after the Closing Date, Buyer shall be entitled exclusively to control, defend and settle any suit, action or proceeding, and any investigation arising out of or related to any Purchased Assets or Assumed Liabilities, so long as such control, defense or settlement does not unreasonably interfere with Seller's ownership of the Excluded Assets or with the Excluded Liabilities; and Seller agrees to cooperate fully in connection herewith provided, however, that Buyer shall reimburse Seller for all reasonable costs and expenses incurred in providing such cooperation.

2.6 Spent Nuclear Fuel Fees. Seller, to the extent of the Salem Interest, shall be liable for and pay, pursuant to the Owners Agreement, all Spent Nuclear Fuel Fees in effect prior to the Closing Date with respect to its share of electricity generated at and sold from the Salem Station prior to the Closing Date, and Buyer shall have no liability or obligation in respect thereof. Buyer shall be liable for and pay all Spent Nuclear Fuel Fees with respect to its share of electricity generated at and sold from the Salem Station, including that relating to the Salem Interest, from and after the closing date, together with all additional Spent Nuclear Fees that are assessed or become effective on or after the Closing Date, whether assessed with respect to electricity generated at or sold from the Salem Station prior to,

on or after the Closing Date, and Seller shall have no further liability or obligation in respect thereof. Without limiting the liability of Buyer under Sections 2.3(e) and (f), from and after the Closing Date, Buyer shall assume title to, and such liabilities and obligations as Seller may have for the storage and disposal of, Spent Nuclear Fuel presently stored at the Salem Station (including any such fuel which may have been used in connection with generating Seller's share of electricity at the Salem Station). From and after the Closing Date, Buyer shall have all rights of recovery from third parties and the Department of Energy relating to, arising from or in connection with the Department of Energy's failure to take Spent Nuclear Fuel.

* * * *

6.8 Risk of Loss. From the date hereof through (but not including) the Closing Date, all risk of loss or damage to the assets or properties included in the Purchased Assets (other than the Decommissioning Funds) shall be borne by Seller. Notwithstanding any provision hereof to the contrary, subject to Section 9.1(g) if, before the Closing Date, all or any portion of the Purchased Assets is (i) condemned or taken by eminent domain or is the subject of a pending or threatened condemnation or taking which has not been consummated or (ii) damaged or destroyed by fire or other casualty, Seller shall notify Buyer promptly in writing of such fact, and (x) in the case of a condemnation or taking, Seller shall assign or pay, as the case may be, any proceeds thereof to Buyer at the Closing and (y) in the case of a fire or other casualty, Seller shall either restore such damage or assign the insurance proceeds therefore (and pay the amount of any deductible and/or self-insured amount

in respect of such casualty) to Buyer at the Closing. Notwithstanding the foregoing, if such condemnation, taking, damage, destruction or other casualty results in a Material Adverse Effect, Buyer and Seller shall negotiate to settle the loss resulting from such condemnation, taking, damage, destruction or other casualty (and such negotiation shall include the negotiation of a fair and equitable reduction of the Purchase Price). If no such settlement can be agreed upon within sixty (60) days after Seller has notified Buyer of such casualty or loss, then Buyer or Seller may terminate this Agreement pursuant to Section 9.1(g).

* * * *

8.3 Arbitration.

(a) Notwithstanding any provision hereof to the contrary, in the event of any dispute between Seller and Buyer arising after the Closing (whether relating to facts, events or circumstances occurring or existing prior to, on or after the Closing Date) and relating to or arising out of any provision of this Agreement (other than disputes arising under Section 2.3, 2.4, 3.2, 3.3, 3.4, 6.5, 8.1(a)(iii) or 8.1 (b)(iii)), the sole remedy available to either Party is the dispute resolution procedure set forth in this Section 8.3; provided, however, that either Party may seek a preliminary injunction or other provisional judicial remedy if such action is necessary to prevent irreparable harm or preserve the status quo, in which case both Parties shall nonetheless continue to pursue resolution of the dispute by means of this procedure. The Party asserting such dispute shall give written notice to the other of the fact that a dispute has arisen pursuant hereto. Such notice shall include (i) a statement setting forth in reasonable detail the facts,

events, circumstances, evidence and arguments underlying such dispute and (ii) proposed arrangements for a meeting to attempt to resolve the dispute to be held within sixty (60) days after such notice is given. Within thirty (30) days after such notice is given, the other Party hereto shall submit to the Party giving such notice a written summary responding to such statement of facts, events, circumstances, evidence and arguments contained in the notice and an acceptance of or proposed alternative to the meeting arrangements set forth in the initial notice.

* * * *

APPENDIX F

STATUTES

9 U.S.C. § 9 (2006) Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

* * * *

9 U.S.C. § 10 (2006) Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

* * * *

9 U.S.C. § 13 (2006) Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

* * * *

28 U.S.C. § 1738 (2006) State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

* * * *

APPENDIX G

CONSTITUTIONAL PROVISIONS

U.S. CONSTITUTION, ARTICLE III, § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

* * * *

U.S. CONSTITUTION, ARTICLE IV, § 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

* * * *

REPLY BRIEF

15 (5)

No. 08-790

Supreme Court, U.S.
FILED
APR 3 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DELMARVA POWER & LIGHT COMPANY and
ATLANTIC CITY ELECTRIC COMPANY,
Petitioners,

v.

UNITED STATES and
PSEG NUCLEAR, LLC and
PUBLIC SERVICE ELECTRIC AND GAS CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF OF PETITIONERS DELMARVA POWER & LIGHT COMPANY and ATLANTIC CITY ELECTRIC COMPANY

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Delmarva Power & Light Company and Atlantic City Electric Company submitted a Rule 29.6 corporate disclosure statement in their Petition for a Writ of Certiorari filed on December 17, 2008.

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IN THE

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DELMARVA POWER & LIGHT COMPANY and
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UNITED STATES and
PSEG NUCLEAR, LLC and
PUBLIC SERVICE ELECTRIC AND GAS CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF OF PETITIONERS DELMARVA POWER & LIGHT COMPANY and ATLANTIC CITY ELECTRIC COMPANY

I. ACE/DELMARVA'S TAKINGS CLAIMS FOR DIMINISHED VALUE WILL BE EXTINGUISHED ABSENT A GRANT OF CERTIORARI

This case involves the assignment of takings claims for diminished value against the Government to a party who may not bring the claims. Both lower courts found that the assignment was invalid under

the Claims Act (36a; 6a).[1] The only question is whether the Government's purported "waiver" of the statute can validate such an assignment and, if so, whether the Government may use a waiver to extinguish claims under the Fifth Amendment.

The contention of the United States and PSEG (together, Respondents) that the Claims Act does not treat takings claims differently from other claims (United States Brief (US)14; PSEG Brief (P)18) misses the critical point that takings claims may only be brought by the owner of the property at the time of the taking. Takings claims may not be brought by a buyer of the property even where all claims associated with the property have been assigned. That is the holding of this Court in *United States v. Dow*, 357 U.S. 17 (1958), which was followed in another spent nuclear fuel (SNF) case before the Court of Federal Claims, *Rochester Gas & Electric Corp. v. United States*, 65 Fed. Cl. 431, 441-42 (2005). Respondents dismiss *Dow* and *Rochester Gas* on the irrelevant ground that there the Government did not accept the assignment or otherwise waive the Claims Act (US15; P16). The simple fact is that, regardless of acceptance or waiver, under *Dow* and *Rochester Gas*, ACE/Delmarva are the only parties who may bring the takings claims that, in the hands of PSEG – the buyers who benefited from the diminished value – would be truly extinguished.

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[1] PSEG's argument that ACE/Delmarva's assignments to PSEG were valid as between ACE/Delmarva and PSEG is irrelevant. Every case involving the Claims Act, by definition, includes an assignment. The issue is whether the assignment is valid as to the Government. *See infra* pp. 9-10.

PSEG's assertion that it is pursuing the takings claims "under a different theory" (P17) and the United States' suggestion that PSEG may do so (US17) are pure rhetoric. A claim brought by PSEG would collide head on with *Dow*'s pronouncement that a subsequent property owner may not receive compensation for the taking, 357 U.S. at 20-21, and *Rochester Gas*'s holding that only the owner at the time may allege a taking, 65 Fed. Cl. at 441. It would also be met by the United States' assertion that any recovery PSEG might achieve would be offset by the benefit PSEG derived by paying a lower price for ACE/Delmarva's property (US17-18). That is the position that the Government took in accepting the assignment (53a), has recently taken in the only SNF case in which a seller's diminished value damages have been adjudicated,[2] and continues to take in its brief here (US17-18). Its position confirms that the result of permitting the Government to "accept" the assignment would not only be to extinguish ACE/Delmarva's "ability to recover a share of any just compensation" (P18), but to extinguish the diminished value takings claims entirely. There would indeed be a very real "danger . . . that takings will go uncompensated" (P17-18), a result unacceptable under the Fifth Amendment.

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[2] On February 3, 2009, in the partially consolidated cases of *Boston Edison Co. v. United States* and *Entergy Nuclear Generation Co. v. United States* (Fed. Cl. Docket Nos. 99-447C and 03-2626C), the Government filed a Counterclaim stating (at ¶ 60) that "the Government is entitled to offset against or recoup from any damages awarded to ENGC the amount of $40.03 million, which represents the amount awarded to BECO upon BECO's claim."

II. THERE IS NO PRECEDENT TO SUPPORT THE GOVERNMENT'S USE OF A WAIVER DEVICE TO AVOID LIABILITY

The myriad cases cited by Respondents are designed to, but cannot, obscure the singular fact that no court has permitted, and no precedent supports permitting, the Government to accept the assignment of a claim not yet reduced to a value. Every case cited by Respondents – save one[3] – is either a Contracts Act case, or a Claims Act case in which the claim had been liquidated.

While PSEG refrains from citing Contracts Act cases, the United States persists in relying on Contracts Act cases interchangeably with Claims Act cases throughout its brief.[4] Because the Claims Act and the Contracts Act are separate statutes addressing different subject matters, cases permitting the Government to waive the Contracts Act do not support a conclusion that the Government may waive the Claims Act.[5]

Both Respondents completely ignore the critical point of distinction in the Claims Act cases they cite, as opposed to those ACE/Delmarva rely on: while the Government may accept the voluntary transfer of liquidated claims (and there is an exception for non-

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[3] *See infra* pp. 7-8.

[4] Contracts Act cases cited by the United States include: *Tufco Corp. v. United States*, 614 F.2d 740 (Ct. Cl. 1980) (US2, US11, US13, US14); *Maffia v. United States*, 163 F. Supp. 859 (Ct. Cl. 1958) (US2, US11, US14); and *Riviera Finance of Texas, Inc. v. United States*, 58 Fed. Cl. 528 (2003) (US11).

[5] See Petition at 15-18 for a discussion of the key points of distinction, all of which Respondents ignore.

voluntary transfers "by operation of law"[6]), it may not accept the voluntary transfer of claims – like ACE/Delmarva's diminished value takings claims – that have not yet been liquidated.[7]

ACE/Delmarva's reliance on *McKnight v. United States*, 98 U.S. 179 (1878), and this Court's other Claims Act cases[8] is well placed. *McKnight* involved the assignment of a government contractor's right to compensation; after the claim was allowed and a warrant for payment issued, the Government paid part of the claim to the assignees, but withheld a

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[6] *See infra* note 10.

[7] The United States consistently mischaracterizes ACE/Delmarva's position, stating first that ACE/Delmarva concede that the Government "generally" may waive the Claims Act, but that this authority does not encompass takings claims (US9) and, to the contrary, that ACE/Delmarva contend "that the government cannot waive the protections of the [Claims Act] at all" (US12). ACE/Delmarva's position is simple: (1) unallowed takings claims may not be assigned for the reasons set forth in Section I; (2) while the Government does not have "general" authority to accept assigned claims, it does have limited power to accept liquidated claims in strict compliance with the Claims Act; and (3) strict compliance is not always necessary where claims have been liquidated and the Government has discharged its obligation and no longer has an interest. The additional allegation that ACE/Delmarva waived their argument by conceding that the Government may accept the assignment of contractual breach claims (US12) is wrong. As noted in the Petition (at 7 n.3), *Rochester Gas* held that the Nuclear Waste Policy Act of 1982 is a statutory override of the Contracts and Claims Acts that permits the assignment of contract claims against the Government, but not takings claims. 65 Fed. Cl. at 441 & n.11.

[8] *See* Petition at 13 & n.10 (citing *United States v. Gillis*, 95 U.S. 407 (1877); *Spofford v. Kirk*, 97 U.S. 484 (1878); *Nutt v. Knut*, 200 U.S. 12 (1906); *Nat'l Bank of Commerce v. Downie*, 218 U.S. 345 (1910)).

portion as a setoff on the contractor's debt to the Government. The Court determined that the partial payment did not constitute a waiver with respect to the remainder. While the United States correctly quotes the Court's observation that "[t]here could have been no consideration for" such a waiver (US13), it neglects to acknowledge the Court's holdings that "no one had authority to make it," that such a waiver would be "without validity," and that "[t]he statute is conclusive upon the subject," *McKnight*, 98 U.S. at 186. With regard to the Government's counterclaim for return of the partial payment, the Court did not permit the Government to "waive" the Claims Act (P14 n.8) or "permissibly accept" a partial assignment (US13). The Court simply found that, where the Government had already paid an allowed claim to assignees with a valid claim against the assignor, the Government could not recoup the dollars paid. *McKnight*, 98 U.S. at 185-86.

The Claims Act cases relied on by Respondents are all cases in which, similarly, the Court ruled that the Claims Act protections were not applicable because the Government had already made payments on liquidated claims. They do nothing to undermine the Claims Act precedent that applies to claims that have not yet been liquidated, like ACE/Delmarva's. *See, e.g.*, *Bailey v. United States*, 109 U.S. 432, 435-36, 440 (1883) (P12-13) (protections of the statute could not be invoked by assignor to recover from the Government an amount already paid to assignee); *Freedman's Sav. & Trust Co. v. Shepherd*, 127 U.S. 494, 505-06 (1888) (P13) (protections not relevant to claims for rent already paid by Government); *McGowan v. Parish*, 237 U.S. 285, 295 (1915) (US11) (Government paid an allowed claim into court;

Government parties were dismissed);[9] *Martin v. Nat'l Sur. Co.*, 300 U.S. 588, 594-95 (1937) (P15) (Government did not need protections because its obligation was already discharged).[10]

That the Court did not "undo" a Government payment already made in these cases does not even come close to judicial approval of Government acceptance of prohibited transfers of unliquidated claims. The single Claims Act case concerning Government acceptance of a transfer prior to liquidation is a trial court decision and is, in any event, *sui generis*. In *NRG Co. v. United States* (US15 & n.5), the court permitted Government acceptance of a reassignment back to the original property owner to protect it from losing its Fifth Amendment takings claims. 31 Fed. Cl. 659, 663 (1994). Here, permitting Government acceptance would serve the contrary purpose of extin-

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[9] Consistent with ACE/Delmarva's position, the *McGowan* Court observed that "it has been several times declared by this court that the statute was intended solely for the protection of the Government and its officers during the adjustment of claims, and that, after allowance, the protection may be invoked or waived, as they in their judgment deem proper." 237 U.S. at 294 (emphasis supplied).

[10] PSEG alleges that *Martin* identifies "'[a]nother line of cases exhibit[ing] an opposing tendency'" to the cases on which ACE/Delmarva rely (P15). That line, however, is comprised of the cases cited by Respondents where the Government's obligation is already discharged, and the cases recognizing a "by operation of law" exception. *See Goodman v. Niblack*, 102 U.S. 556, 560-61 (1881) (P15) (Claims Act protections not applicable to assignments that are involuntary, but occur "by operation of law"); *see also United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 374-80 (1949) (US11, US14) (acknowledging that other line of cases and recognizing that an insurance company subrogated to an insured's claim is a transferee within the "by operation of law" exception).

guishing ACE/Delmarva's takings claims. In short, *NRG* supports ACE/Delmarva's position, not Respondents'.

Nor do Respondents' cases support their suggestion (US2, US10, US14; P11-12) that the Government is free to accept assignments simply because the Claims Act protections are for its benefit. They simply find that, where the Government does not need the Claims Act protections because it has nothing at stake, the statute has no effect on private disputes involving assignments.[11] Here, Respondents seek to absolve the Government from liability to both the assignor (by the assignment) and the assignee (by the offset), a position that stands both the statute and the Fifth Amendment on their heads.

III. THIS CASE IS APPROPRIATE FOR REVIEW BY THIS COURT

The validity of ACE/Delmarva's takings claims is not before this Court. Nonetheless, the United States argues (US16-17) that this case is not appropriate for review because ACE/Delmarva's claims are based on the Standard Contract, and courts in SNF cases have held such claims must be litigated as contract

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[11] This Court has never stated that only the Government may invoke the Claims Act (*see* US10). *Martin* (where the Government was not even a party) does not so state, and is just one of the many cases, like those cited by PSEG (P14), in which the Court has not permitted parties to invoke the Claims Act to resolve private differences where the Government has already discharged its obligation. 300 U.S. at 595; *see also Bailey*, 109 U.S. at 439; *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369 (1945). Moreover, this Court has permitted a private party to repudiate an assignment of an unliquidated claim under the Claims Act. *See Spofford*, 97 U.S. at 488-90 (cited in *Bailey*, 109 U.S. at 437).

claims.[12] In each case cited, however, the court dismissed the takings claim based on its specific facts and after finding that plaintiffs could pursue a remedy under the Standard Contract.[13] Moreover, in a number of SNF cases not cited, courts rejected motions to dismiss takings claims even where plaintiffs also raised contract claims, pending trial or the development of a more comprehensive record to determine the scope of the takings and contract claims. *See, e.g., Consol. Edison Co. of New York, Inc. v. United States*, 67 Fed. Cl. 285, 291-92 (2005); *Sys. Fuels, Inc. v. United States*, 65 Fed. Cl. 163, 172-73 (2005); *Detroit Edison Co. v. United States*, 56 Fed. Cl. 299, 302-03 (2003); *see also Rochester Gas*, 65 Fed. Cl. at 442 (plaintiff may have both contract and takings claims). Thus, it would not be appropriate for this Court to address the validity of ACE/Delmarva's takings claims at this juncture.

Moreover, the arbitration award does not moot this case (*see* P18-21).[14] That award was issued in a private

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[12] The appropriate way to raise this issue would be in trial court as a motion: (1) to dismiss under Fed. R. Civ. P. 12(b)(6), where the only question would be whether "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim,'" *Sys. Fuels, Inc. v. United States*, 65 Fed. Cl. 163, 168 (2005) (citation omitted), or (2) for summary judgment under Fed. R. Civ. P. 56(c), where the court would evaluate issues in the light most favorable to ACE/Delmarva and grant the motion only if no genuine issue of fact exists, *id.* at 169. This Court is not in a position to make such determinations now.

[13] *See Sys. Fuels, Inc. v. United States*, 78 Fed. Cl. 769, 809 (2007); *N. States Power Co. v. United States*, 78 Fed. Cl. 449, 472 (2007); *Pac. Gas & Elec. Co. v. United States*, 70 Fed. Cl. 766, 779-80 & nn.13 & 14 (2006); *Canal Elec. Co. v. United States*, 65 Fed. Cl. 650, 655-56 (2005).

[14] *Segal v. Rochelle*, 382 U.S. 375 (1966), cited by PSEG (P19), does not deal with an arbitration award and does not support

proceeding between ACE/Delmarva and PSEG. It did not involve, much less bind, the Government. ACE/Delmarva's claims here are not against PSEG; they are against the Government.[15] Moreover, while the award determined that ACE/Delmarva had assigned their claims, the New Jersey court affirming the award found that it left open the question of the effect of the assignment (P9). Both courts below subsequently found the award invalid under the Claims Act (36a; 6a). The question here is whether the Government's acceptance of the assignment somehow validates it, not whether there was an assignment confirmed by the arbitration award. Far from rendering this case moot, the award is simply irrelevant.

PSEG's argument that the arbitration award is conclusive, but instead supports the distinction made by ACE/Delmarva in Section II of this brief between unallowed claims and those for which a payment has been made. *Segal*, addressing the question of the transferability of claims within the meaning of the bankruptcy code, reaffirmed *Martin*, in which the Claims Act protections were held not to apply after the claims had been collected. *See supra* pp. 6-7. The Court further noted that it had previously ruled in *United States v. Shannon*, 342 U.S. 288 (1952), "that one holding a claim invalidly assigned under [the Claims Act] may not sue the Government upon it though he join his assignor as well." 382 U.S. at 384-85. And, while the *Segal* Court observed that a state court could compel an assignor to pay over a refund received or even to collect the claim, it could only compel the assignor to "make it over by a valid assignment when that became possible," in other words, after the claim has been allowed. *Id.* at 385. There is simply nothing in *Segal* to suggest that a state court can compel an assignment of a not yet allowed claim.

[15] *Vermont Yankee Nuclear Power Corp. v. United States*, 84 Fed. Cl. 339 (2008), cited by PSEG (P21), is not conclusive. That decision was based on the trial court's detailed interpretation of the contract at issue there. Moreover, the ruling is not binding on this Court and is, in any event, the subject of a pending appeal (Fed. Cir. Case No. 2009-5029).

IV. THE COURT SHOULD GRANT CERTIORARI TO PROTECT THE INTERESTS OF ELECTRIC RATEPAYERS NATIONWIDE

ACE/Delmarva's claims against the Government, while they involve tens of millions of dollars, are not unique. As noted by Amicus National Association of Regulatory Utility Commissioners, representing utility commissions in all fifty states, this case "presents a question of law central to the responsibility of State regulators to balance the interests of retail customers and utilities" and will affect the interests of millions of electric customers in multiple states (Amicus Brief at 5).[16] This Court should grant certiorari to answer that important question, which will arise not only in the other SNF cases currently pending against the Government, but in any case in which the Government seeks to utilize its proposed new waiver device to avoid liability for a taking.

Respectfully submitted,

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April 3, 2009

[16] While PSEG argues (P3) that the New Jersey Board of Public Utilities found that the sale price of ACE/Delmarva's property was fair, the consequences of the Government's action were known at that point, and the price was considered fair taking into account the effect of the Government's taking.

117 (2)

No. 08-790

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In the Supreme Court of the United States

DELMARVA POWER & LIGHT COMPANY AND
ATLANTIC CITY ELECTRIC COMPANY,
Petitioners,

v.

UNITED STATES AND
PSEG NUCLEAR, LLC AND
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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January 21, 2009

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Supreme Court Rule 37.3(b), the National Association of Regulatory Utility Commissioners (NARUC) respectfully requests leave to file this *amicus curiae* brief in support of Petitioners.

On January 6, 2009, NARUC solicited the consent of all parties to the filing of this brief. Written consent was provided by counsel for the Petitioners and by the Solicitor General for Respondent United States. However, counsel for Respondents PSEG Nuclear, LLC and Public Service Electric and Gas Company called NARUC's counsel and indicated he would not respond in writing to NARUC's request.

NARUC's members are State government agencies in all fifty States, the District of Columbia, and U.S. territories. NARUC has been recognized by both Congress and Courts as a proper representative of State commission interests.

The majority of NARUC's members are charged by State law with oversight of electric retail rates. Some are also charged with approving, with conditions, nuclear plant sales like the one that is the subject of Petitioners' request.

NARUC is well positioned to advise the Court as to the probable broad impact of its decision on retail rates and the public interest.

The costs of on-site storage of nuclear waste that the federal government has contracted to remove are significant. Those costs are reflected directly in diminished price Petitioners received for the sale of plant that is subject of the writ for certiorari. There is no question this impacts ratepayers. If the petition for certiorari is denied, NARUC's member State commissions' ability to protect the public interest will be undermined. Indeed, it is precisely because of the probable impact that NARUC was directed by its members to file an *amicus* brief supporting Petitioners. NARUC's *amicus* will be concise and bring to the Court's attention relevant details not otherwise covered in the original Petition. We respectfully request that the Court grant this motion.

Respectfully submitted:

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DATE: January 21, 2009

QUESTION PRESENTED

Whether the United States may consent via waiver to the assignment of a takings claim without complying with the express terms of the Claims Act, 31 U.S.C. § 3727(a)(1)?

PARTIES TO THE PROCEEDING

The parties to the proceedings before the United States Court of Appeals for the Federal Circuit were Delmarva Power & Light Company and Atlantic City Electric Company, Plaintiffs-Appellants below; the United States, Defendant-Appellee below; and PSEG Nuclear, LLC and Public Service Electric and Gas Co., also Defendants-Appellees below.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to U.S. Sup.Ct. Rule 29.6, NARUC states, as follows: NARUC is a quasi-governmental non-profit association incorporated in the District of Columbia. NARUC has no parent corporation nor is there any publicly held corporation that owns stock or other interest in NARUC. NARUC is supported predominantly by dues paid by its State public utility commissioner members and through revenues generated by meetings of those members held three times each year.

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INTEREST OF AMICUS CURIAE[1]

The National Association of Regulatory Utility Commissioners ("NARUC"), founded in 1889, is a national organization whose members include the agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the rates and conditions of service associated with the intrastate operations of electric, natural gas, water, and telephone utilities. NARUC's members ensure that electric utility services are provided at rates and conditions that are just, reasonable and nondiscriminatory.

Both Congress[2] and federal courts[3] have consistently recognized NARUC as a proper entity

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[1] Pursuant to S. Ct. R. 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and that no counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief.

[2] See 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members to Federal-State Joint Boards to consider issues of concern to both State regulators and the Federal Communications Commission on universal service, separations, and other issues); See also 47 U.S.C. § 254 (1996) (describing functions of the Joint Board on Universal Service). See also *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "Carriers, to get the cards, applied to [NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations the ICC issued to create the "bingo card" system).

[3] See *United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985).

to represent the collective interests of the State utility commissions.

The Nuclear Waste Policy Act (NWPA), enacted in 1982, made the federal government responsible for safe disposal of high-level radioactive waste, including spent nuclear fuel. Under the Act, utilities pay for the eventual disposal of commercial nuclear waste through the Nuclear Waste Fund (NWF), which is, in turn, passed through to ratepayers.

Although utilities and their ratepayers continue to pay these charges, the Department of Energy (DOE), which manages the disposal program, has failed to meet its statutory and contractual obligation to begin waste acceptance by 1998. *Meanwhile, spent fuel accumulates at 72 locations in 35 States at sites that were never intended for long-term storage.*

It is obvious, since 1998, this requirement to maintain on-site storage – and the continuing uncertainty of when DOE will finally accept this waste – has had a significant impact on the valuation of utility property.

Ratepayers ultimately bear the cost of fees paid to the federal government by utilities that provide electricity from nuclear sources. Over $29 billion in fees and interest has been collected since 1983 to eventually pay for permanent disposal of spent nuclear fuel from commercial nuclear power plants.

Ratepayers are also directly impacted when nuclear facilities – whose valuation has been significantly diminished by DOE's inaction – are sold or transferred.

State Commissions, like their federal colleagues,[4] are charged with protecting ratepayers from excessive electricity prices. One tool NARUC's member commissions use is careful oversight and approval of the sales of utility assets.

The impact on retail electricity rates of sales of devalued nuclear facilities can be significant and varied. A buyer's recognition of the ongoing costs of waste storage that DOE should have already taken, necessarily reduces the price paid for these assets. That price, in turn, limits the size of any phased ratepayer refunds.[5]

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[4] See *Pa. Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 418, 72 S.Ct. 843, 96 L.Ed. 1042 (1952) ("A major purpose of the [Federal Power] Act is to protect power consumers against excessive prices."); see also *Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 388, 79 S.Ct. 1246, 3 L.Ed.2d 1312 (1959) ("The [Natural Gas] Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates.").

[5] Compare, Nov. 9, 2005 Order Denying Petition, Rejecting Proposals To Institute Investigations, And Providing For Alternative Relief, CASE 05-G-1209, *New York State Electric & Gas Corp. and Rochester Gas and Electric Corp. Petition for Authorization for Funds to Provide Emergency Financial Aid to Low-Income Natural Gas Heating Customers During the 2005-06 Winter Season*, at 2, available at: http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/CED7F4503EAB1FE7852570B40054ED44/$File/05g1209_11_09_05.pdf?OpenElement, where the New York commission rejected a utility request to accelerate "disposition of a $10.0

Long after the sale, losses from an undervalued sale can potentially increase rates to reflect deferred taxes and depreciation associated with the sales.[6] Finally, such losses can also significantly increase ratepayer liability for stranded costs.[7]

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million refund, from the proceeds of the 2004 sale of its Ginna nuclear . . . facility, due to its electric customers under its existing five-year Rate Plan."

[6] See "*Public Advocate Says Atlantic Electric's Proposal Would Cost South Jersey Ratepayers More*," August 16, 2007 release, from the New Jersey Public Advocate, available at: http://www.nj.gov/publicadvocate/news/2007/approved/070815_atlantic_electric_divest.html, which urged the Board of Public Utilities (a NARUC member) to deny a utility's request to increase costs recoverable from ratepayers:

> "***The costs at issue arose from losses upon the sale in 2000 of Atlantic Electric's interest in nuclear generating units. An expert . . . found that the proposal would increase costs to ratepayers by $91.5 million***. . . The proceeding involves the treatment of federal income tax benefits related to deferred taxes and the depreciation practices associated with the sale of Atlantic's interest in the Hope Creek, Salem, and Peach Bottom nuclear generating units." {emphasis added}

[7] See Feb. 18, 2000 *Preliminary Statement of the Division of the New Jersey Ratepayer Advocate Regarding the Proposed Sale of Nuclear Generation Assets in BPU Docket No. EM99110870*, at <http://www.rpa.state.nj.us/acenuc.htm>, expressing concern about the "extent to which the sales price reflects a true market value of the assets," and "Atlantic's request that the Board find that the Company may recover the Eligible Stranded Costs associated with the nuclear asset sale." He states:

NARUC's member commissions have a vital interest in the outcome of this case. As Petitioners point out, there are at least five other utilities – *representing the interests of more than three million ratepayers* – that have both sold interests in nuclear properties and also brought takings claims against the Government. Pet. Br. at 3-4. Other sales are possible. This case presents fundamental questions regarding a federal court's ability to ignore both Congress's explicit instructions in the Claims Act, 31 U.S.C. § 3727, as well as this Court's clear precedent in *United States v. Dow*, 357 U.S. 17 (1958) (*Dow*). It presents a question of law central to the responsibility of State regulators to balance the interests of retail customers and utilities. This Court should grant the writ.

> "*Atlantic has admitted that the sales price that it negotiated is far below the market value that Atlantic claimed existed for these same ownership interests during the stranded cost proceedings.* This difference would produce a significant increase in stranded costs, which Atlantic requests be fully recovered from its customers. If the Board approves the sale, it should adopt an appropriate ratemaking adjustment to ensure that Atlantic's customers are not burdened with increased stranded costs from the sale of its interest in Peach Bottom, Salem, and Hope Creek . . . the Board must ensure that New Jersey customers . . . are not forced to pay higher stranded cost charges due to an incorrect or incomplete calculation of the net proceeds, or by [the] decision to sell . . . at a substantial loss." {emphasis added}

SUMMARY OF ARGUMENT

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249 at 253-4(1992), The text of the Claims Act, 31 U.S.C. § 3727, is clear. Even the decision below expressly concedes the language applies to the circumstances presented. Pet. Br. App. at 6(a). If the Federal Appeals Court had stopped its analysis with that concession, its holding would have been on all fours with this Court's decision in *Dow*, 357 U.S. 17, 18-21 (1958), which specifies that compensation for a taking is due the original property owner. It did not. Instead, the Court accepts a solution created *sui generis* by the Court of Claims: a government waiver – referenced nowhere in the statute – that permits an assignment of a claim. It is worth noting that no waiver is needed to *allow* an assignment of a claim, just government compliance with the provisions of the statute. Compliance is absent in the case at bar. The effect of this ruling is to extinguish the original owner's takings claim by the government through its transfer to a party that cannot pursue it. That result cannot be squared with text of either the Claims Act or the Fifth Amendment command that private property cannot be taken for public use without just compensation. Pet. Br. App. At 41(a).

ARGUMENT

Mindful of the admonitions of U.S. Sup. Ct. Rule 37 concerning original material potentially helpful to the Court, NARUC, to avoid repetition, fully endorses Petitioners' arguments. It is clear the decision below ignores this Court's precedent on the Claims Act. It is also clear that the outcome is not tenable. No court should allow any government to eviscerate an otherwise valid claim of uncompensated government confiscation by forcing the assignment of a takings claim to a purchaser who cannot pursue the claim. Aside from this specific endorsement of Petitioners' arguments, NARUC also offers the following:

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH THE PLAIN LANGUAGE OF THE CLAIMS ACT AND LEADS TO AN UNACCEPTABLE OUTCOME

The touchstone for understanding any statute is Congressional intent. As this Court consistently points out:

> "[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . .[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. See, e.g., *United States v. Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241-

> 242 (1989); *United States v. Goldenberg*, 168 U. S. 95, 102-103 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68 (1810). When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete." *Rubin v. United States*, 449 U. S. 424, 430 (1981)." {emphasis added}[8]

The Claims Act is crystal clear. It states plainly that "[a]n assignment of any part of a claim against the United States Government . . . may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." 31 U.S.C. § 3727(b).[9]

Even the authors of the decision below concede that:

> On its face, this language covers the assignments of the takings claims. The claims had not been allowed (indeed, the government contested them), their amount was undecided, and no warrant for their payment had been issued. Id.

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[8] *Connecticut National Bank v. Germain*, 503 U.S. 249 at 253-4(1992), See also *Caminetti v. U.S.*, 242 U.S. 470 (1917), reasoning "the meaning of a statute must . . . be sought in the language in which the act is framed, and if that is plain... the sole function of the courts is to enforce it according to its terms."

[9] See *Delmarva Power & Light Co. v. United States*, 542 F.3d 880 (Fed. Cir. 2008) (Delmarva) Pet. Br. App. at 6(a).

If the Federal Appeals Court had stopped its analysis there, its holding would have been on all fours with this Court's decision in *Dow*, 357 U.S. 17, 18-21 (1958), which specifies that compensation for a taking is due to the original property owner.[10] It did not. Instead, the Court accepts a solution created *sui generis* by the Court of Claims: a government waiver – referenced nowhere in the statute – that permits an assignment of a claim. It is worth noting that no waiver is needed to *allow* an assignment of a claim, just government compliance with the provisions of the statute. Compliance is absent in the case at bar.

Based on its perfunctory analysis of two decisions, *Tuftco Corp. v. United States*, 614 F.2d 740 (Ct. Cl. 1980), and *Maffia v. United States*, 163 F. Supp. 859 (Ct. Cl. 1958), which the Judges concede *are based on different statutory text dealing with the assignment of contracts (not claims)*, the court below concludes that there is "no valid reason why the government should not also be able to waive the [Claims] Act's prohibition in section 3727(a)." Pet. Br. App. at 6a-8a There is no reliance on any jurisprudence actually based on the Claims Act – and – in spite of Petitioners' direct reliance on Dow – it warrants no mention in the decision below. As Petitioners accurately points

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[10] In *Dow*, the issue was whether the compensation claim vested in those that owned the property when the "taking" (by eminent domain) of an easement occurred or with a later owner in possession when the government filed a declaration of taking. This Court held the attempt to convey the claim to the second owner failed because the Claims Act "prohibits the voluntary assignment of a compensation claim against the Government for the taking of property." Id.

out, Pet. Br. at 9-10, the effect of this ruling is to extinguish the original owner's takings claim by the government through its transfer to a party that cannot pursue it. That result cannot be squared with text of either the Claims Act or the Fifth Amendment command that private property cannot be taken for public use without just compensation. Pet. Br. App. At 41(a).

CONCLUSION

For these reasons, the writ should be granted.

Respectfully Submitted,

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